Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling	)	
Obligations of Incumbent Local Exchange	)	
Carriers	)	CC Docket 01-338
	)	
Implementation of the Local Competition	)	
Provisions of the Telecommunications Act of	)	
1996	)	CC Docket 96-98
	)	
Deployment of Wireline Services Offering	)	
Advanced Telecommunications Capability	)	CC Docket 98-147

COMMENTS OF Z-TEL COMMUNICATIONS, INC.

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April 5, 2002

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SUMMARY

The Telecommunications Act of 1996 ("1996 Act") has not yet delivered what it promised residential and small business customers. Yet the *NPRM* asks whether the Commission should eliminate the one form of competitive entry that is now finally beginning to deliver more choices to residential and small business consumers than any other: the "platform" of unbundled network elements (the "UNE platform" or "UNE-P"). As the Commission told the Supreme Court last year, "the UNE platform has been the most important vehicle for competitive entry into local markets for residential and small business customers."[1] If the Commission were to eliminate competitors' ability to purchase these network elements as a group, the real losers would be the nearly five million American residential and small business consumers who have taken advantage of the innovative products that UNE-P has allowed competitors to bring to market.

In these comments, Z-Tel Communications, Inc. ("Z-Tel") (1) shows that section 271 requires the Bell Operating Companies ("BOCs") to provide access to the most critical network elements at cost-based rates; (2) explains that competitors would be impaired in seeking to serve mass market customers without access to the UNE platform primarily on account of the costs, delays, and capacity issues arising from the use of manual hot cuts; (3) presents empirical evidence showing that the availability of the full array of unbundled network elements *advances* the goal of promoting competitive entry and facilities-based competition; and (4) establishes that Congress has preserved the ability of state commissions to create additional unbundling obligations.

[1] Brief for Petitioners Federal Communications Commission and the United States, No. 00-511 *et al.*, *Verizon Communications, Inc. v. FCC* and related cases 44 (April 2001).

Section 271. Although the NPRM focuses on section 251(d)(2) rather than section 271, the checklist requires the BOCs to unbundle the most important network elements at the cost-based rates governing interconnection agreements. Three of the checklist items explicitly require BOCs to unbundle loops, transport, and switching, and Congress explained that BOCs must provide those elements *at a minimum* in their interconnection agreements. Another checklist item requires BOCs to provide access to network elements at cost-based rates and in accordance with the other terms governing interconnection agreements. Congress therefore has resolved the unbundling decision with respect to BOCs for the three key elements that constitute the UNE platform. The Commission cannot countermand Congress's decision to single out these elements as crucial to the development of local competition.

The special treatment given loops, transport, and switching in the checklist strongly suggests that incumbents other than BOCs also should make those elements available. In any event, analysis under the framework the Commission established in 1999 in the *UNE Remand Order* confirms that competitors seeking to provide voice service to mass market customers should continue to have access to the already-combined unbundled network elements of UNE platform.

Impairment. In the *UNE Remand Order*, the Commission sensibly focused on five factors, including cost, in considering whether competitors would be impaired within the meaning of section 251(d)(2) without access to network elements. It would not be reasonable to conclude that competitors are not impaired if their cost of self-provisioning a network element is significantly greater than the cost of the incumbents. In addition, it is important to keep in mind that section 251(d)(2) focuses on the needs of *requesting*

competitors and the services they seek to offer. Other worthy policy considerations, such as promoting the deployment of facilities, are not relevant to impairment and must play a secondary role in the unbundling analysis.

Z-Tel would be impaired in providing telephone service to mass market customers without access to key unbundled network elements because there is today no wholesale market for exchange service and exchange access, the functions provided by the platform. Of particular importance are the problems that result from manual hot cuts, which are expensive, time-consuming, and error-prone. The impairment resulting from manual hot cuts would only be relieved if customers could change their local carrier as reliably, quickly, and inexpensively as they can change their long-distance carrier. Therefore, until an automated process is available for quickly and efficiently changing customers from one local carrier to another, the delays and costs resulting from the manual hot cut process will cause competitors seeking to serve mass market customers to be impaired without access to the UNE platform.

Z-Tel and other entrants are also impaired because of the substantial cost differences that new entrants face when they seek to deploy their own facilities in competition with an entrenched incumbent. Indeed, recent developments in the industry have starkly illustrated this point, as a number of new entrants have gone into bankruptcy by building facilities before obtaining customers. The "field of dreams" has become a "field of nightmares." That experience undercuts the incumbents' simplistic argument that switch deployment by some new entrants shows that competitors are not impaired without access to unbundled local switching and the UNE platform.

As the Commission concluded in 1999, medium and large business customers have different characteristics than mass market customers. But the Commission's "three-line rule" adopted in 1999 drew the line between those businesses, on the one hand, and the mass market at the wrong point. As a result, small businesses have benefited the least from the market-opening provisions of the 1996 Act. The line between the mass market and the market for medium and small businesses should be drawn at the point where it becomes economically efficient for a customer to use a DS1 line, as New York recently concluded by defining a small business as a company that requires 18 lines or fewer.

Facilities-based competition. In addition to the impairment, the Commission's unbundling framework calls for consideration of additional goals, including the goals of introducing competition into the mass market rapidly and promoting full facilities-based competition. Empirical evidence described in detail in these comments shows that the incumbents' contention that the availability of unbundled network elements at cost-based rates interferes with the development of facilities-based competition is demonstrably wrong. If the incumbents' contention had merit, new entrants would have deployed switches to a greater extent in areas where the availability of the UNE platform has been restricted. The empirical evidence shows the opposite, and that availability of the UNE platform promotes the rapid introduction of competition into the mass market.

The Commission sometimes speaks of "facilities-based competition" together with "innovation" as if the two always go together. However, there is tension between those two goals with respect to voice service for mass market customers. Z-Tel has invested more than $100 million in developing innovative software to provide advanced services those customers find desirable. To serve mass market consumers of analog,

dialtone services, innovation is more likely to occur through that method than by unnecessary investment to replicate network elements currently available on an unbundled basis, and Z-Tel would not have been able to invest in the development of innovative software if it had been required to duplicate the incumbents' networks.

The role of the states. Section 251(d)(3), the provision of the Act entitled "preservation of state access regulations," is properly interpreted, as the Commission interpreted it in 1999, to permit state commissions to make additional elements available on an unbundled basis. That provision plainly preserves state efforts to develop competition, as the Eighth Circuit held in a portion of its 1997 decision that was not overturned by the Supreme Court.[2]

The National Association of Regulatory Utility Commissioners (NARUC) has recognized that competitors seeking to serve the residential and small business customers must rely on UNE-P, and resolved that state commissions should support the availability of the UNE platform.[3] The Commission should follow NARUC's recommendation.

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[2] *Iowa Utilities Board v. FCC*, 120 F.3d 753, 806-07 (8th Cir. 1997), *not reviewed by AT&T v. Iowa Utilities Board*, 119 S. Ct. 721 (1999).

[3] NARUC's *Resolution Concerning the UNE Platform* is appended to these comments as Attachment 1 ("*NARUC UNE-P Resolution*").

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COMMENTS OF Z-TEL COMMUNICATIONS, INC.

Z-Tel Communications, Inc. seeks to provide telephone service to mass market customers – the residential and small business customers that have not yet seen many new choices from the Telecommunications Act of 1996 ("1996 Act"). In the last two years, Z-Tel has worked to give those mass-market consumers a choice in no fewer than 38 states. Today, more than 260,000 mass market customers, many of whom never before had a choice, purchase Z-Tel's innovative local services. To give these customers a reason to switch telephone companies, Z-Tel has developed its own innovations to make the telephone service these customers receive more attractive and useful. In New York, for example, for $49.99 per month Z-Tel provides local service and 200 minutes of long distance, along with voice mail, caller ID, a distinctive call forwarding service, call waiting, three-way calling, speed dialing, and other innovative advanced features. And this service is not available in Manhattan or New York City only – consumers in

Poughkeepsie, Montauk, and Utica can buy the same innovative services at the same price.[4]

Z-Tel can provide these services on a broad and ubiquitous basis only because of the availability of the unbundled network element platform in New York and the other 37 states where it does business. By utilizing this mode of entry, Z-Tel is delivering on the promise of the 1996 Act for residential and small business consumers. The Commission must not now take steps that break that promise.

While Z-Tel relies on the UNE platform, it also uses that platform to deliver its own innovative services. Z-Tel was originally a software company, devoted to designing and developing unique new applications for the telephone. Today, Z-Tel uses its own software and facilities to create distinctive, innovative telephone services that add value for consumers.[5] For example, Z-Tel provides voice mail by means of a computer located in Tampa, and Z-Tel customers can check their voice mail box over the Internet. Z-Tel also provides "find me" call forwarding, which differs from ordinary call forwarding in that a call may be directed to multiple numbers, such as first a wireless phone and then an office phone. Z-Tel is developing voice recognition capabilities to further improve its distinctive offerings. Z-Tel simply could not serve its customers if it could not rely on the UNE platform; the time and money required to build new facilities, and the

[4] Attachment 2 contains a map of Z-Tel's current nationwide availability of its Z-LineHOME service, and also presents examples of Z-Tel's print and outdoor advertising materials.

[5] For a more detailed description of Z-Tel's service offerings, *see* Declaration of Robert A. Curtis on Behalf of Z-Tel Communications, Inc., ¶¶ 4-7 ("Curtis Decl..") (Attachment 3).

limitations imposed by hot cut volumes and charges, as well as collocation fees, would erect an insurmountable barrier to entry.

Because there are several long-distance companies, Z-Tel is able to provide the long-distance component of its service by entering into wholesale agreements with interexchange carriers (IXCs). But, of course, there is no wholesale substitute for the UNE platform yet. Z-Tel would prefer not to rely on the ILECs to provide the local component of its service and has carefully considered how to obtain the facilities needed to provide local service elsewhere. As described in detail in these comments, however, self-provisioning switching and the other elements of the UNE platform would be too costly and would result in delays that are unacceptable to mass market customers, primarily on account of the manual hot cut process. Z-Tel would welcome the introduction of an automated and highly reliable cutover process. Without such a process, however, Z-Tel must rely on unbundled network elements obtained from the ILECs to build a customer base while working to move away from any reliance on the ILEC networks.

Before turning to the specific issues raised by the Commission in the NPRM,[6] it is useful to consider what is at stake in this proceeding. Approximately five million mass market customers have chosen Z-Tel or another competitor that uses the UNE platform as their telephone company. That number dwarfs the number of mass market customers who have been able to exercise a choice to obtain service provided by any other means.

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[6] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Dec. 20, 2001) ("*NPRM*").

According to industry statistics described below, markets routinely touted by the Commission as the "most competitive" – such as New York and Texas – are unique from relatively "uncompetitive" states *solely by virtue of UNE platform-based entry.* That result should not be surprising, however, because competition facilitated by the UNE platform is the primary type of competition to which mass market consumers have access – as Z-Tel's radio advertisements, billboards, television ads, and print advertisements attest.[7]

Any significant restriction on the availability of the UNE platform would threaten to eliminate mass market consumer choice and condemn residential and small business customers to a "choice" between the ILEC's service or the ILEC's service. That is the "choice" they had for decades and that is the choice the 1996 Act was enacted to broaden. Without new choices, the 1996 Act will be an abject failure for residential and small business customers.

Many other commenters in this proceeding will focus on markets other than the mass market for voice service because they intend to serve large business customers or to provide broadband service. The Commission should not lose sight of Z-Tel and the handful of other competitive local exchange carriers ("CLECs") that are aiming to provide innovative options to mass market consumers of voice products. Importantly, what may be an appropriate level of unbundling for large business or broadband customers is *not* necessarily congruent with the level of unbundling needed to support entry for the mass market. The telecommunications market is highly diverse, and the demands of mass market dialtone customers (where, for example, customer churn is high

[7] For examples of those ads, *see* Attachment 2.

and multi-year contracts are unheard of) are considerably different from those of large business customers (where multiyear contracts are routine). In the end, ensuring that competition exists in the mass market for voice services ought to be one of the Commission's highest priorities. It clearly ranks high on Congress's list of priorities.

In our view, therefore, a more granular approach to the unbundling rules is welcome and warranted if it is undertaken with demand-side, service-specific needs in mind. Whatever the Commission's conclusions regarding the network elements available to CLECs seeking to provide broadband or to serve medium and large businesses, a separate analysis is warranted with respect to CLECs seeking to provide mass market voice service. As NARUC recently concluded, CLECs seeking to serve that market must have access to the UNE platform The competition that has developed in that market – less than might be hoped six years after enactment, but five million lines nonetheless – largely depends on the availability of UNE-P. The last thing the Commission should do is enact rules that will lead to less choice for mass market consumers.

NARUC recently concluded that "[m]any State commissions have embraced UNE-P as a means to expand customer choice for mass market, residential, and small business consumers," and resolved that "State commissions should support the implementation of universal availability of the UNE-P."[8] NARUC recognized that the availability of competitive options that consumers find desirable – such as Z-Tel's offerings – would be severely reduced if the UNE platform were not available. NARUC therefore recommended that the elements necessary to provide the UNE platform be on the list that is available nationwide to serve mass market customers.

[8] *NARUC UNE-P Resolution*, Attachment 1 at 1.

In addition, when considering the various complaints advanced by the ILECs, the Commission should ask whether those complaints are actually based on retail pricing rules rather than any issue presented in this proceeding. The ILECs complain that unbundling at cost-based rates is unfair because they are subject to unreasonably low caps on their retail rates for some services in some states. Those claims may or may not be correct, and the answer may vary from state-to-state and service-to-service. But the Commission should not alter its unbundling rules in an effort to counteract any unfairness to incumbents resulting from unreasonably low retail rates. Rather, the Commission should enact unbundling rules in line with the requirements of the statute and the ILECs should seek appropriate rebalancing relief from the state commissions if it is warranted.

A recent decision by the New York Public Service Commission ("NYPSC")[9] – adopted pursuant to a settlement joined by Verizon – shows that there is nothing about making the UNE platform broadly available that is necessarily unfair to the ILECs. The NYPSC required Verizon to make the UNE platform available without restriction to serve the mass market by adopting an "18-line" rule in place of the Commission's three-line rule. Verizon, in turn, was given pricing flexibility so that it may raise its retail rates. That shows that it is not necessary to restrict the availability of the UNE platform in order to balance allegedly low retail rates for rural residential customers. Indeed, continued (and expanded) availability of the UNE platform could be seen as a key to future rate deregulation efforts.

[9] *Verizon New York*, Order Instituting Verizon Incentive Plan, Case 00-C-1945 (issued February 27, 2002). The NYPSC proceeding is discussed in more detail in Part II.C, *infra*.

I. THE BELL OPERATING COMPANIES MUST PROVIDE LOOPS, TRANSPORT, AND SWITCHING, AT A MINIMUM, IN ACCORDANCE WITH THE STATUTORY PROVISIONS GOVERNING INTERCONNECTION AGREEMENTS.

The NPRM sought comment "on the relationship between section 271(c)(2)(B)" (the 14-point competitive checklist) "and sections 251(d)(2)" (which sets forth the requirement to consider impairment) "and 251(c)(3)" (which sets forth ILECs' general unbundling obligations).[10] The checklist plainly requires BOCs to provide unbundled access to loops, transport, and switching in accordance with the general statutory unbundling requirements. That means, among other things, that BOCs must provide nondiscriminatory access to unbundled network elements at cost-based rates. The Commission lacks authority under section 251(d)(2) to override Congress's determination that BOCs must provide those three elements on those terms.

A. The Section 271 Checklist Requires BOCs To Unbundle Loops, Transport, And Switching.

In the section 271 checklist, Congress specifically addressed the unbundling requirements of BOCs with respect to the three most critical network elements. Items four through six of the section 271 checklist require that "loop transmission," "transport," and "switching" be provided on an "unbundled" basis. The statute thus could hardly be more clear that BOCs must provide unbundled access to those three elements. The second item on the checklist mandates that BOCs provide "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." The two statutory provisions cross-referenced in the second checklist item require network elements provided pursuant to interconnection agreements to be provided

[10] *NPRM*, ¶ 72.

on fair terms (section 251(c)(3)) and at cost-based rates (section 252(d)(1)). Because: (1) the second checklist item requires BOCs to provide unbundled network elements at cost-based rates in accordance with the general statutory requirements governing interconnection agreements; and (2) checklist items four through six require BOCs to unbundle loops, transport, and switching; (3) BOCs must provide unbundled access to loops, transport, and switching at cost-based rates and in accordance with the other provisions governing interconnection agreements.

The other network elements that the Commission requires all ILECs to unbundle pursuant to section 251(d)(2) must also be provided by BOCs in accordance with the statutory provisions governing interconnection agreements, as the second checklist item requires. But checklist items four through six make clear that BOCs seeking authorization to provide long-distance service must unbundle loops, transport, and switching at cost-based rates, whatever the Commission decides with respect to other ILECs or other network elements.

Section 271(d)(4) further provides that "[t]he Commission may not, by rule or otherwise, limit . . . the terms used in the competitive checklist." Thus, Congress explicitly prohibited the Commission from relieving BOCs of the duty of providing unbundled access to loops, transport, and switching at cost-based rates, except pursuant to the forbearance provision. As discussed below, under that provision BOCs may be relieved of the obligation to unbundle those critical network elements, but only after the general forbearance requirements have been met and the market-opening provisions of the Act have been "fully implemented" within the meaning of section 10(d).

The legislative history confirms that BOCs must provide access to the three network elements in accordance with the requirements of the statutory provisions governing interconnection agreements. The language that later became sections 271 and 251 appeared in the Senate bill in essentially the same terms as in the statute as enacted. In particular, the Senate bill contained a provision that became section 271 that included a checklist. Among the items on the checklist were a provision, comparable to checklist item two as enacted, setting forth the general requirement of nondiscriminatory access to network elements and three additional checklist items that required BOCs to unbundle loops, transport, and switching.[11] The bill also included a provision denominated section 251 that contained subsections comparable to sections 251(c)(3) and 252(d)(1) as enacted. Those provisions required ILECs to make unbundled elements available to CLECs on fair terms and at cost-based rates.[12]

The Senate Report accompanying its bill explained the relationship between the checklist and the rules governing interconnection agreements: "The Committee does not intend the competitive checklist to be a limitation on the interconnection requirements contained in section 251. Rather, the Committee intends the competitive checklist to set forth what must, at a minimum, be provided by a Bell operating company in any interconnection agreement approved under section 251 to which that company is a party

[11] S. 652, 104th Cong., 1st Sess. (1995), § 255(b)(2)(A), (D), (E), and (F).

[12] S. 652, §§ 251(b)(1), (3), and 251(d)(6). Section 251 of the Senate bill contained both the substantive rules set forth in section 251 as enacted and the procedural rules set forth in section 252 as enacted.

. . . before the FCC may authorize the Bell operating company to provide in region interLATA services."[13] The Committee's explanation of these provisions thus confirms that the statute means what it says: the checklist sets forth what a BOC must provide "at a minimum" in an interconnection agreement. Of course, under section 252(d)(1), CLECs have the right to pay cost-based rates for network elements provided pursuant to an interconnection agreement. Therefore, BOCs must provide unbundled access to loops, transport, and switching at cost-based rates.[14]

B. There Is No Basis For The Conclusion That BOCs May Provide The Three Elements Without Complying With The Requirements Governing Interconnection Agreements.

The Commission's brief discussion of the relationship between sections 271 and 251 in the *UNE Remand Order* did not adhere to a straightforward reading of the statute. The Commission acknowledged that BOCs must provide unbundled access to loops, transport, and switching. But the Commission concluded "that the prices, terms, and

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[13] S. Rep. 104-23, 104th Cong., 1st Sess. 43 (1995).

[14] While the checklist requires the BOCs to "unbundle[]" loops, transport, and switching, it does not expressly require "unbundling" for directory assistance and a number of other items also listed on the checklist. Indeed, whether directory assistance (and other items) qualified as "network elements" was hotly debated, and the issue was not resolved until the Supreme Court "agree[d] with the Eighth Circuit that the Commission's application of the 'network elements' definition is eminently reasonable." *AT&T v. Iowa Utilities Board*, 525 U.S. at 387. The Commission's decision on those points was upheld by the Eighth Circuit as a reasonable construction of an ambiguous statute rather than on the basis that the Commission's construction was required by the plain terms of the statute. *See Iowa Utilities Board v. FCC*, 120 F.3d at 808-09. For that reason and because no checklist item other than those relating to loops, transport, and switching expressly speaks of "unbundling," it is not as clear that Congress intended those other checklist items to be read together with checklist item two. It *is* clear, however, that Congress expressly mandated that loops, transport, and switching, "at a minimum," be unbundled by the BOCs.

conditions set forth under sections 251 and 252 do not presumptively apply to the network elements on the competitive checklist of section 271."[15]

In explaining this conclusion, the *UNE Remand Order* stated that "section 271 does not specify that the checklist network elements must be provided in accordance with section 251(c)(3)."[16] That statement was simply wrong. As set forth above, the second checklist item by its plain terms requires "Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." Thus, Congress could hardly have been more clear that BOCs must provide network elements on the general terms required by section 251(c)(3) and at the cost-based rates prescribed by section 252(d)(1).

The *UNE Remand Order* similarly erred in finding that prices for the unbundled loops, transport, and switching required by section 271 could be set under section 201(b) rather than under section 252(d)(1). According to the *UNE Remand Order*, "[s]ection 201(b) provides a basis for the Commission to scrutinize the prices, terms, and conditions under which the checklist network elements are offered."[17] By its terms, however, section 201 applies only to "interstate or foreign . . . communication service." But the relevant checklist items each begin with the word "local" – so that checklist items four through six speak of "*[l]ocal* loop transmission," "*[l]ocal* transport," and "*[l]ocal* switching" – which makes clear that Congress did not view them as "interstate or foreign." They are, as the statute repeatedly says, predominantly *local* functions.

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[15] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC 3696, 3905 (1999) ("*UNE Remand Order*").

[16] *Id.*

Accordingly, contrary to the Commission's finding in the *UNE Remand Order*, it has no authority to regulate the prices for these network elements under section 201(b).

In the NPRM, the Commission appeared to confuse its rulemaking authority under the *last* sentence of section 201(b) with its authority to set prices for interstate and foreign services under the *first* sentence of section 201(b).[18] As explained by the Supreme Court in *AT&T v. Iowa Utilities Board*, the last sentence of section 201(b) gives the Commission general rulemaking authority with respect to all provisions of the Communications Act, including those provisions that address intrastate matters.[19] Loops, transport, and switching are predominantly "local" facilities, as the checklist reiterates, and the statutory provision governing the price at which they are provided to competitors is section 252(d)(1). Under the Supreme Court's decision, the Commission has authority to promulgate rules implementing section 252(d)(1), despite the fact that it addresses local matters generally preserved to the states by section 2(b).[20] But the Commission has no authority to issue pricing rules for predominantly local facilities under the first sentence of section 201(b), which by its terms applies only to interstate and foreign facilities.

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[17] *Id.* at 3905-06.

[18] The first sentence of section 201(b) authorizes the Commission to ensure that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable." 47 U.S.C. § 201(a). "Such communication service" in that sentence relates back to "interstate or foreign communication by wire or radio" in section 201(a). The last sentence of section 201(b) authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."

[19] 525 U.S. at 376-86.

[20] *See id*. at 381 (discussing 47 U.S.C. § 152(b)).

Even if the Commission *could* invoke section 201(b) as a source of authority to set prices for the network elements on the checklist, it simply would not make sense to do so. It is, after all, beyond dispute that at precisely the same time that Congress adopted the checklist requirement that BOCs provide unbundled network elements (section 271(c)(2)(B)), it also adopted a specific mechanism for setting unbundled "network element charges" (section 252(d)). As a matter of the most basic common sense, it defies belief that Congress would mandate the unbundling of network elements and simultaneously provide a mechanism for setting UNE prices, and yet not intend that the Commission apply that mechanism. Moreover, even were common sense barred from consideration, well-known canons of statutory construction mandate that a more recent and/or more specific statutory provision trumps an earlier and/or more general one.[21] Here, section 252(d) is both the more recent (as it was enacted in 1996, while section 201 dates back to the 1934) and the more specific (as it addresses charges for UNEs, rather than "prices, terms, and conditions" generally) of the two possible sources of authority to set prices for UNEs. Accordingly, the structure of the Communications Act as a whole, like the plain language of statute and its legislative history, also supports the straightforward reading of sections 271 and 251 set forth above.

The Commission's incorrect interpretation of section 271 in the *UNE Remand Order* appears to have been influenced by arguments advanced at that time by

[21] *See, e.g., Brown v. General Services Administration*, 425 U.S. 820, 834 (1976) ("In a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts . . . [a] more general" one); T. Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 104 (2d ed. 1874) ("If two inconsistent acts be passed at different times, the last is to be obeyed.").

Ameritech.[22] Ameritech claimed that "[t]he point of including the specific network elements, such as loops, transport, and switching, on the section 271 list was to cover situations . . . in which a BOC sought 271 relief prior to completion of the Commission's rulemaking on the section 251 UNEs."[23] That unsupported claim is utterly fanciful, particularly since the Commission was required to issue its rules implementing section 251 within six months of enactment.[24] No BOC sought authorization pursuant to section 271 during that period and, in fact, no BOC submitted an acceptable application for more than three years. Moreover, BOC supporters had argued that the Act was defective since it did not contain "a date certain for entry," which they contended was needed "because the FCC and the Department of Justice are very slow to act."[25] No one expected the grant of a section 271 application shortly following enactment.[26]

Moreover, as set forth above, the legislative history of section 271 confirms that Congress did not include loops, transport, and switching on the checklist in anticipation

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[22] *See UNE Remand Order*, 15 FCC Rcd. at 3904 (citing Ameritech's Comments and Joint Reply Comments in the *UNE Remand* proceeding).

[23] Ameritech *UNE Remand* Reply Comments at 22.

[24] 47 U.S.C. § 251(d)(1).

[25] S. Rep. 104-23, 104th Cong., 1st Sess. 11 (1995) (statement of Peter Huber).

[26] Congressional supporters of the BOCs opposed the bills that led to the Act because it would delay BOC entry into the long-distance market. Senators Packwood and McCain, for example, contended that a "calendar deadline" was needed because whether BOC entry would be "in the 'public interest, convenience and necessity' can be argued endlessly at the Federal Communications Commission and in the courts." *Id.* at 70-71. Similarly, Congressman Dingell and other opponents contended that the House bill "imposes onerous new regulations that will delay and make extremely difficult Bell Company entry into new lines of business." H.R. Rep. No. 104-204, Part I, 104th Cong., 1st Sess. 207 (1995). Of course, in the statute as enacted, Congress did not adopt a date certain for entry; retained the public interest standard; and adopted the 14-point checklist from the Senate bill rather than the less rigorous six-point checklist in the House bill that Congressman Dingell and other opponents nevertheless considered too "onerous."

of the grant of a section 271 application prior to the completion of the section 251 rulemaking. Rather, the Senate Report clearly explained that those items were included to establish "what must, at a minimum, be provided by a Bell operating company in any interconnection agreement approved under section 251 to which that company is a party . . . before the FCC may authorize the Bell operating company to provide in region interLATA services."[27]

Ameritech also argued in 1999 that reading the references to loops, transport, and switching in checklist items four through six in a straightforward manner would render them "wholly superfluous; the simple reference in section 271(c)(2)(B)(ii) would have been sufficient."[28] That is simply not so. The separate listing of loops, transport, and switching serves the purpose of making clear that BOCs must provide *those* elements on an unbundled basis – a requirement not set forth in checklist item two – regardless of how the Commission exercises its unbundling authority under section 251(d)(2). Similarly, Congress did not state in checklist items four through six that loops, transport, and switching must be provided at cost-based rates or on the terms required by section 251(c)(3) because those three checklist items were intended to be read together with checklist item two, which already set forth those requirements. Thus, contrary to Ameritech's contention, the checklist were drafted to *avoid* redundancy.

Ameritech also contended that section 251(d)(2) compels the Commission "to make its own determination" with respect to loops, transport, and switching, uninformed

[27] S. Rep. 104-23, *supra*, at 43.

[28] Ameritech *UNE Remand* Comments at 51.

by Congress's determination in section 271.[29] That is an implausible reading of the statute. The Commission does not have license to ignore congressional determinations, and Congress specified in the checklist that BOCs must provide loops, transport, and switching on an unbundled basis. Section 251(d)(2) is a general provision that sets forth the standards for determining whether network elements should be unbundled. Nothing in section 251(d)(2) even hints that it overrides Congress's specific determination that BOCs must unbundle loops, transport, and switching. Therefore, the proper reading of the statute is that section 251(d)(2) governs all of the unbundling obligations of ILECs other than BOCs and all of the unbundling obligations of BOCs in addition to those addressed by the checklist.

The logic of Ameritech's argument refutes its position. If the Commission must "make its own determination" under section 251(d)(2), uninformed by section 271, then there is no reason why the Commission could not conclude that BOCs need not provide unbundled access to loops, transport, and switching at all. But that conclusion is plainly contrary to the checklist items requiring BOCs to unbundle those three elements and Congress's further mandate in section 271(d)(4) that the Commission may not delete items from the checklist. Presumably for that reason, the BOCs have not had the audacity to argue that they are not required to unbundle loops, transport, and switching at all, only that they are not required to do so at the rates and terms governing interconnection agreements. But as we have explained above, Congress stated that it "intends the competitive checklist to set forth what must, at a minimum, be provided by a

[29] Ameritech *UNE Remand* Reply Comments at 22.

Bell operating company in any interconnection agreement approved under section 251 to which that company is a party."[30]

Moreover, consideration of the language of section 251(d)(2) confirms that it does not supersede the specific requirements of the checklist. Section 251(d)(2) requires the Commission to "consider, at a minimum," whether CLECs would be impaired without access to various elements. As the D.C. Circuit has held, an instruction that the Commission "consider" a factor "means only that it must 'reach an express and considered conclusion' about the bearing of a factor, but is not required 'to give any specific weight' to it."[31] Thus, although the Commission is required to consider whether CLECs would be impaired without access to specific network elements, the impairment standard does not necessarily control the unbundling decision. Rather, consideration of other factors may lead the Commission to conclude that an element should be made available, notwithstanding doubts as to whether CLECs would be impaired without access to the element. The requirement that the Commission generally "consider" impairment certainly does not override Congress's instruction that BOCs *must* provide loops, transport, and switching.

Nothing in the Supreme Court's decision in *AT&T v. Iowa Utilities Board* is to the contrary. The Court simply held that a Commission rule that in effect says "that whatever requested element can be provided must be provided" is inconsistent with the Act.[32] So with respect to other ILECs and other elements, the Commission must consider

[30] S. Rep. 104-23, *supra*, at 43.

[31] *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1112.

[32] 525 U.S. at 388-89.

whether CLECs would be impaired without access to the element. But *Congress* has made the unbundling determination with respect to three critical elements provided by BOCs.

Ameritech also argued that section 251 would have provided a more logical place than section 271 to order the unbundling of loops, transport, and switching. Congress's focus, however, was on opening local exchange markets to competition for the vast majority of Americans served by BOCs.[33] Many provisions of the Act (including section 251(f)) recognize that the other ILECs are differently situated from BOCs. It was entirely reasonable and unsurprising for Congress to require that, no matter how else section 251(d)(2) was implemented, BOCs would be required to unbundle loops, transport, and switching on a nondiscriminatory basis at cost-based rates.

C. Under the Forbearance Provision, BOCs Must Provide The Three Elements At Cost-Based Rates Until The Act Has Been "Fully Implemented."

The conclusion that Congress intended to require BOCs to make loops, transport, and switching available in accordance with the provisions governing interconnection agreements is further supported by analysis of the forbearance provision. Section 10(d) treats section 251(c)(3) and section 271 differently from other provisions of the Act. Under section 10(d), the Commission may not forbear from applying those two provisions, and only those two provisions, even if the general three-part test for forbearance set forth in section 10(a) is met, "until it determines that those requirements have been fully implemented." Thus, even if adherence to the cost-based pricing rule is not necessary to ensure that rates are "just and reasonable;" even if requiring BOCs to

unbundle loops, transport, and switching is "not necessary for the protection of consumers;" and even if forbearance from requiring BOCs to unbundle those three elements is otherwise "consistent with the public interest,"[34] the Commission may not relieve BOCs of that obligation until it makes the further finding that the Act has been "fully implemented." Congress thus gave special attention to sections 251(c)(3) and 271 in the forbearance provision, requiring that an additional hurdle be cleared before BOCs may decline to provide three critical elements at cost-based rates.

Congress put special emphasis on sections 251(c)(3) and 271 because those sections, which include the key market-opening provisions of the Act and provide BOCs with incentive to comply with those provisions, are the heart of the 1996 Act. Unbundled access to loops, transport, and switching at cost-based rates, in turn, forms the core of those provisions, as their special treatment in the checklist illustrates. Experience since 1996, detailed below, confirms Congress's conclusion that those elements must be available to competitors in order for there to be competition that benefits residential customers and small businesses.

Accordingly, any attempt to eliminate those three network elements from the unbundling obligations of BOCs must be conducted under section 10. In order to be relieved of the duty to provide loops, transport, and switching, the BOCs must prevail in a forbearance proceeding in which they demonstrate full implementation of sections 251(c)(3) and 271 in addition to the other requirements of section 10. Until then, BOCs

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[33] Congress was well aware that the "BOCs control over 80 percent of the local telephone network." H.R. Rep.104-204, Part 1, 104th Cong., 1st Sess. 50 (1995).

[34] 47 U.S.C. § 160(a)(1), (2), and (3).

must provide unbundled access to loops, transport, and switching in their interconnection agreements, as Congress required.

II. Z-TEL'S ABILITY TO SERVE MASS MARKET CUSTOMERS WOULD BE IMPAIRED WITHOUT ACCESS TO THE UNE PLATFORM.

The *NPRM* raised a number of questions concerning the continued availability of critical unbundled network elements, and particularly circuit switching.[35] As explained above, Congress has resolved the question of whether BOCs should provide unbundled access to the three key elements of the UNE platform: BOCs must provide unbundled access to loops, transport, and switching at cost-based rates and on the other terms governing interconnection agreements. Section 271 does not address the obligations of other ILECs, however. Nor does section 271 determine the obligations of BOCs with respect to all network elements.

Section 251(d)(2) governs the unbundling obligations of other ILECs and whether BOCs should unbundle elements other than those listed in the checklist. That provision directs the Commission, "in determining what network elements should be made available," to "consider, at a minimum," whether CLECs would be impaired without access to specific network elements.[36] The *UNE Remand Order* implemented that provision by establishing the framework the Commission uses to determine which network elements should be made available on a nationwide basis. Under that analytical framework, a CLEC is impaired if, "taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning . . . or

[35] *NPRM*, ¶¶ 55-62.

[36] The impairment standard applies to most network elements. With respect to elements that are "proprietary in nature," a stricter necessity standard applies. 47 U.S.C. § 251(d)(2)(A).

acquiring an alternative from a third-party supplier, lack of access to that element *materially diminishes* a requesting carrier's ability to provide the services it seeks to offer."[37] The *UNE Remand Order* identified five factors of particular relevance to the impairment analysis: "cost, timeliness, quality, ubiquity, and operational issues associated with use of [an] alternative."[38]

In addition to impairment, the Commission considers five other factors in order to determine whether an element should be included in the regulation listing elements that must be made available nationwide. The first two of those additional considerations are whether unbundling an element will promote the "rapid introduction of competition in all markets" and the effect of unbundling on "facilities-based competition, investment, and innovation." In addition, the Commission considers whether unbundling an element "reduce[s] regulation," along with its effect on "certainty in the market" and "administrative practicality."[39]

In this section and the next, we examine whether the elements of the UNE platform should be unbundled under the framework the Commission has established under section 251(d)(2). That analysis shows that all of the elements of the UNE platform should be made available to competitors seeking to provide voice service to mass market customers. As we demonstrate in this section, those CLECs would be impaired without access to the UNE platform and each of its elements. In addition, as we show in the next section, the availability of the UNE platform will spur the development of competition and, contrary to the ILECs' claims, spur investment in facilities as well.

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[37] 15 FCC Rcd. at 3725 (emphasis added).

[38] *Id.* at 3705.

A. The Impairment Analysis Requires Examination Of The Needs Of Specific Competitors And Analysis Of Their Cost Of Self-Provisioning.

1. Section 251(d)(2) focuses on the needs of specific competitors.

The Commission asked, with respect to the unbundling framework, "how should we consider the level of competition for a particular service?"[40] The answer is that, while the level of competition undoubtedly is an important consideration, it is a factor to be considered in a forbearance proceeding under section 10 rather than in implementing section 251(d)(2). Section 251(d)(2) focuses on the needs of CLECs by directing the Commission to consider whether the failure to provide access to a particular network element would impair that competitor's ability "to provide the services it seeks to offer." The focus is therefore on the specific requesting competitor under section 251(d)(2) and on the particular services that competitor seeks to offer. Therefore, it is no answer with respect to a CLEC like Z-Tel seeking to serve the mass market to say that CLECs seeking to serve large businesses are not impaired without access to unbundled switching or shared transport. A more granular approach is required.

Nor is it permissible under section 251(d)(2) to conclude that Z-Tel is not impaired because some other CLECs seeking to serve the mass market would not be impaired without access to the UNE platform. A cable operator, for example, may not need access to all of the elements of the platform, but the Act does not require Z-Tel to buy a cable company in order to compete in the mass market. Nor would the existence of

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[39] *Id.* at 3747-50.

[40] *NPRM*, ¶ 38.

a cable operator in a particular geographic market offering telephone service establish that a CLEC like Z-Tel would not be impaired without access to loops in that market.

The ILECs have claimed that the existence of a single competitor that is not using an element shows that CLECs are not impaired without access to that element. There is no merit to that extravagant claim, as the Commission has concluded.[41] The ILECs sometimes contend that CLECs are making an equally extravagant claim: that if one competitor – even a particularly inefficient CLEC – is impaired without access to an element, it must be available to all competitors for any purpose. That is not Z-Tel's position. Rather, Z-Tel believes that a more granular analysis focused on the "services" that new a entrant "seeks to offer" is required. That analysis must include consideration of the market the CLEC seeks to serve and the nature of the services it seeks to provide, and it is entirely appropriate to consider the needs of a reasonably efficient competitor rather than a particularly inefficient competitor. But as we will show, a reasonably efficient competitor seeking to provide voice service to the mass market would be impaired without access to the platform of unbundled network elements at this time.

At some point, competitors may not need the UNE platform. For example, the development of a wholesale market for a complete network service that is the equivalent of the unbundled network elements of the UNE platform would fundamentally change the analysis.[42] If Z-Tel had a choice of numerous wholesalers from which it could provide

[41] *See, e.g., UNE Remand Order*, 15 FCC Rcd. at 3810 ("[S]witch unbundling cannot turn on whether a single carrier has self-provisioned switching.").

[42] That wholesale product must provide the local component of a full-service telephone company's product offering, not just switching. As discussed below, CLECs are impaired in self-provisioning switching for the mass market primarily on account of the cost, delay, and capacity problems arising from the manual hot cut process. In other words, in serving the mass market, it is the loop-switch combination – a combination that

the local component of its service, Z-Tel would not be impaired without access to the UNE platform.[43] For the long-distance component of its service, Z-Tel has such a choice. But there is no wholesale market available with respect to exchange access and exchange service.

Section 251(d)(2) appropriately focuses on the requirements and needs of the new entrant CLEC and *not* the level of competition that consumers experience. Indeed, it is not relevant to the Section 251(d)(2) inquiry whether a competitive market for "intermodal" local services exists from the consumer's standpoint. That inquiry may be relevant to the section 10 forbearance analysis, but not for constructing a list of UNEs under section 251(d)(2). Under section 251(d)(2), Congress has mandated that the Commission focus is on the needs of requesting carriers rather than on the level of competition for a particular service.

2. Cost is a key factor in the impairment analysis.

The Commission asked, with respect to the factors governing impairment, whether "cost" should "be afforded less weight than the other factors."[44] In order to establish the certainty needed for competitive entry, as well as the reasons discussed below, the answer is "no." The Commission previously determined that cost is the most important factor in the impairment analysis, and the Commission should adhere to that determination.

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exists ubiquitously throughout the ILEC network, but that must be laboriously constructed *by hand* when a CLEC seeks to deploy a switch – that is the true locus of ILEC market power. A wholesale market for switching capacity would not relieve that impairment.

[43] Such a service could, for example, eventually be provided by a cable operator.

[44] *NPRM*, ¶ 19.

From the standpoint of common sense, it is hard to imagine what factor could be more important than cost in an impairment analysis. A fundamental tenet of economics is that there exists a direct and causal link between the ability to provide a service and the production costs of the producer.[45] Indeed, in competitive markets, even small cost disadvantages can severely limit a competitor's ability to amass market share, possibly forcing the competitor to exit the market.[46]

Of course, competitors cannot be expected to enter and compete effectively if they must make massive entry investments in markets that the ILECs served for decades as protected monopolists. Congress understood that fact. It concluded that competitors would not have fully redundant networks in place "because the investment necessary is so significant."[47] Therefore, it added, "[s]ome facilities and capabilities (*e.g.*, central office switching) will likely need to be obtained from the incumbent local exchange carrier pursuant to the new section 251."[48] Congress thus focused on cost in explaining the need for unbundling.

The Commission, therefore, has consistently and reasonably interpreted the Act as requiring that it pay particular attention to cost as part of the impairment analysis. As the Commission concluded in the *UNE Remand Order*, an "important purpose . . . of [the Act is] . . . permit[ting] competitive LECs to compete with the same economies of the

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[45] *See generally* Z-Tel Policy Paper No. 5, *Some Thoughts on Impairment: An Economic Analysis of the Impairment Standard of the 1996 Telecommunications Act* (April 2002) (Attachment 4).

[46] *Id.*

[47] Joint Statement of Managers, S. Conf. Rep. 104-230, 104th Cong., 2d Sess., at 148 (1996).

[48] *Id*.

incumbents."[49] Those economic advantages "obtained by the incumbents by virtue of their status as government-sanctioned and protected monopolies" enable them "to serve new customers at a much lower cost" than a new competitor.[50] The Commission has consistently and correctly concluded since enactment of the 1996 Act that Congress "addressed this problem by mandating that incumbent LECs share their economies of scale and density with competitors."[51]

The Commission properly observed in 1999 that "[t]he incumbent LECs still enjoy cost advantages and superiority of economies of scale, scope, and ubiquity as a result of their historic, government-sanctioned monopolies."[52] There is simply no way to ensure that CLECs share in the "cost advantages" resulting from the ILECs' historic monopoly position without analyzing exactly what those cost advantages are. Accordingly, consistent with the Act's "important purpose" of ensuring that competitive entrants share in the economies of scale and scope of the incumbents, the Commission must continue to give substantial weight in the impairment analysis to issues of cost.

The Commission's finding in the *UNE Remand Order* that impairment exists where the "cost of the alternative element is materially greater than the cost of obtaining the corresponding element from the incumbent"[53] is fully consistent with the Supreme

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[49] *UNE Remand Order*, 15 FCC Rcd. at 3739.

[50] *Id*.

[51] *See, e.g., id*.; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 15508-09 (1996) ("*Local Competition First Report and Order*").

[52] *UNE Remand Order*, 15 FCC Rcd. at 3739 (citing *Local Competition First Report and Order*).

[53] *Id.* at 3734.

Court's decision in *AT&T Corp. v. Iowa Utilities Board*.[54] The *AT&T* Court criticized "the Commission's assumption [in the *First Report and Order*] that *any* increase in cost . . . imposed by the denial of a network element . . . renders access to that element 'necessary,' and causes the failure to provide that element to 'impair' the entrant's ability to furnish its desired services."[55] The Court continued: "An entrant whose anticipated annual profits are reduced from 100% of investment to 99% of investment has perhaps been 'impaired' in its ability to amass earnings, but has not *ipso facto* been 'impaired . . . in its ability to provide the services it seeks to offer;' and it cannot realistically be said that the network element enabling it to raise its profits to 100% is 'necessary.'[56] As that shows, the Court did not hold that cost was not a relevant factor, but instead concluded that not *any* difference in cost established impairment.

With regard to self-provided switching, there are substantial and demonstrable cost differences between incumbent LECs and competitive entrants like Z-Tel. Attachment 4 to these comments presents Z-Tel's detailed empirical analysis of these cost differences, and how they can have an enormous impact on the ability of an entrant like Z-Tel to survive providing mass-market services.[57]

Significantly, the data presented in Attachment 4 mirror what was shown in the *UNE Remand* proceeding in 1999. In 1999, the Commission credited MCI's evidence showing that "competitor's switching costs per minute at a 10% penetration level are slightly more than twice the cost of an incumbent LEC serving the remaining 90% of the

[54] 525 U.S. 366 (1999).

[55] *Id.* at 389-90 (emphasis in original).

[56] *Id.* at 390.

[57] *See* Attachment 4 (Z-Tel Policy Paper No. 5).

market with its own switch."[58] A difference of that magnitude plainly impairs a competitor's ability to provide service. Such evidence is entitled to substantial weight, particularly in light of the Commission's correct and consistent conclusions that the key purpose of the unbundling provisions is to share the economies of scale and scope of the incumbents. In contrast, it is difficult to see how a conclusion that a competitor is not impaired by substantial cost differences could be justified under the Act. Significant cost differences substantially limit a CLEC's "ability . . . to provide the services that it seeks to offer."

B. Z-Tel Would Be Impaired Without Access To Unbundled Local Switching.

Turning from consideration of the section 251(d)(2) framework to its application, CLECs like Z-Tel continue to be impaired in the absence of the elements comprising the UNE platform. With respect to switching, the *UNE Remand Order* found: "[T]aking into account the cost, quality, ubiquity and timeliness factors in our 'impair' standard, as well as the goals of the Act, lack of access to unbundled switching as a general matter, impairs the ability of a requesting carrier to provide service to consumers."[59] The Commission concluded that "requesting carriers are impaired in their ability to provide service in most markets, primarily because of the costs of self-provisioning and switching in those markets."[60] In addition to the direct costs of switches, the Commission underscored that self-provisioning requires substantial expenditures for collocation and "hot cuts" (or "cutovers") – the process of manually extending loops to a requesting

[58] *UNE Remand Order*, 15 FCC Rcd. at 3813-14.

[59] *Id.* at 3810.

[60] *Id.* at 3810-11.

carrier's collocation cage – which "materially diminish a requesting carrier's ability to offer service using self-provisioned switching."[61] The Commission also emphasized that "incumbent LECs retain material scale advantages with regard to provisioning and operating local circuit switches."[62] Accordingly, unbundling switching was consistent with the Act's "important purpose . . . of . . . permit[ting] competitive LECs to compete with the same economies of the incumbents."[63]

The Commission also concluded in the *UNE Remand Order* that "the coordinated loop cutover process imposes a *material delay* on competitive LECs that offer services using self-provisioned switches."[64] The Commission flatly rejected ILEC arguments that "the Commission should not consider coordinated cutover delays." "Without coordinated loop cutovers," the Commission found, "requesting carriers cannot provide the services they seek to offer."[65] The Commission also noted that that even though incumbent LECs had, to the time of the *UNE Remand Order*, only "provisioned relatively small volumes of coordinated loop cutovers compared to anticipated demands," "independent auditors have found difficulties regarding coordinated loop cutover performance."[66] The Commission therefore concluded that "the coordinated loop cutover process impairs the ability of a requesting carrier to provide timely [and reliable] service."[67]

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[61] *Id.* at 3816 (collocation), and 3817 (cutovers).

[62] *Id.* at 3814.

[63] *Id.* at 3739.

[64] *Id.* at 3817.

[65] *Id.* at 3820.

[66] *Id.* at 3820.

[67] *Id.* at 3821.

In this section, Z-Tel examines the characteristics of the "mass market" and shows how the concerns of cost, delay, and reliability that the Commission properly highlighted in requiring unbundling of local switching in the *UNE Remand Order* are as troubling today as they were three years ago. Indeed, if anything, changes in market conditions since 1999 make unbundled switching (and the availability of all of the unbundled network elements of the platform) even more important today. Z-Tel therefore urges the Commission not to depart from the *UNE Remand Order*'s conclusion that switching generally must be made available on an unbundled basis to serve mass market customers.

1. The Mass Market To Which Z-Tel "Seeks To Offer" Services Has Distinctive Characteristics.

It is easy to underestimate the scale and scope of entry required to serve the "mass market." This is the market in which Z-Tel (and a handful of other CLECs) "seeks to offer" services and is, therefore, the point of departure for a granular approach to availability of the elements of the UNE platform.

To be successful in providing service to its target market, a carrier's service capabilities must, of course, be congruous with customer expectations. In the *UNE Remand Order*, the Commission ordered access to unbundled local switching to serve the "mass-market residential and small business consumers." That same market definition has been utilized by the Commission in its review of BOC and other industry mergers.

Z-Tel defines the "mass market" similarly – as consumers of analog, "plain old telephone service," or POTS. According to current 2001 ARMIS data, there are over 140 million analog telephone lines in the United States. The principal purchasers of these analog telephone lines are residential and small business consumers – customers that do

not, unlike larger businesses, require high-bandwidth connectivity at T1 levels and above. In all, over 75% of all phone lines in the country are purchased by customers who buy analog dialtone or analog Centrex services. As discussed above, the Commission and state regulators should be keenly interested in preserving the interests and choices of these consumers.

Several significant demand-side characteristics of mass market consumers are not shared by higher-bandwidth customers:

- *High churn and changing needs*. There is a significant amount of churn among mass market consumers.[68] Z-Tel estimates that at least 4% of its lines turn over each month.[69] As discussed below, this high degree of churn has a substantial impact on competitive entry.

- *Low average incremental revenue per account*. Customers without intensive telecommunications needs sufficient to warrant a T1 or high-speed data service tend to be small accounts. Z-Tel typically sells a bundle of local, long-distance and innovative, enhanced messaging services to residential consumers at rates from $24.99 to $49.99 per month. Even a business with ten lines represents only a few hundred dollars of revenue opportunity per month.

- *Difficulty in distinguishing profitable customers from unprofitable ones*. Many analog accounts are low-volume, money-losing accounts. But other analog dialtone accounts are very profitable, with high-volume from vertical and access

[68] Census data suggest that nearly 20% of U.S. residential households move every year. *See, e.g.,* Bureau of the Census, U.S. Dept. of Commerce, Current Population Reports, Series P-20, NO. 463, *Geographical Mobility*: *March 1990 to March 1991* VIII (1992). Similarly, Z-Tel estimates that about 20% of small businesses move, close, or change in size sufficiently to require a change in service each year *See* 1998 Census Data, available at www.census.gov/gsd/subs/usst97_98.xls (indicating that among businesses with fewer than 20 employees, 12% go out of business, 27% expand employees, and 22% contract employees each year).

[69] That statistic is consistent with data and testimony provided by Verizon. In May 2000, Bell Atlantic – New York ("BA-NY") testified before the state commission that "approximately 25% of the BA-NY access lines are disconnected in any year . . . . The 25% of the outward/inward movement that yields no net gain in lines is referred to as 'churn.' . . . Increasing levels of local competition are certain to increase customer churn . . . ." Bell Atlantic – New York response to interrogatories, Case 98-C-1357, 14-15 (May 12, 2000).

services. For these mass-market analog consumers, there is no hard-and-fast method of distinguishing between the profitable and unprofitable customers.[70] In addition, regulatory requirements may require a carrier to serve all such customers.

- *Demand reliable service.* The Bell System provided world-class (albeit inefficient) analog dialtone service. As a result, American customers now expect that their analog wireline phones will work – even during power blackouts and emergencies. And neither customers nor regulators will tolerate glitches in the 911 system.[71]

- *Month-to-month service, no annual contracts.* Mass market customers tend to buy telecommunications services on a month-to-month basis and not pursuant to annual contracts. More intensive consumers of T1-and-above telecommunications are more willing to sign annual or other term commitments. Suppliers to the mass market therefore generally cannot count on that ability to recoup these costs. As a result, provisioning processes to serve the mass market must be as automated and cost-effective as possible.

- *Headache-free installation, prompt customer service and clear bills*. Unlike large businesses, residential consumers and small businesses generally do not have the time, inclination, or ability to fix, tolerate, or address service or billing problems. Some large businesses even have substantial "back-up" telecommunications systems that mass market customers simply cannot afford. Large businesses may also be more tolerant of initial CLEC cut-over headaches because saving 10% for a large business may represent several thousand dollars in a year. In contrast, saving 10% for a small business may not even represent one hundred dollars in a year. Accordingly, one glitch or delay in the cut-over process for a mass market customer may be sufficient to convince the customer to go back to the incumbent.

In order to serve this market profitably, service providers must meet these customer expectations. In particular, mass market carriers must have:

[70] This is characteristic of most "mass market" products. For example, a hardware or grocery store does not make money on the consumer who buys only a few items – the margin on the sale probably does not cover the overhead and wage of the cashier. But that store must have its doors open to those "money losing" transactions so as to be in a position to take advantage of the more substantial, "money making" transactions (such as the individual that buys a lawn mower or spends $200 on groceries).

[71] One need only consider the pictures of block-long lines at payphones after the September 11 attacks to understand that consumers expect a high quality of service from landline phones.

- *Mass marketing advertising campaign, to keep customer acquisition costs low*. Because of the high degree of churn for the mass market, carriers in a competitive market cannot expect to keep any particular customer for more than 18-24 months. The gross margin from monthly charges must not only exceed the monthly costs of serving the customer – it must, over the life of the customer, exceed the cost of acquiring the customer as well. Accordingly, to acquire customers, a service provider must use efficient mass marketing advertising techniques, such as radio, television, print, and outdoor advertising. Examples of the outdoor and print advertising Z-Tel has used in several markets, including Michigan, Illinois and Pennsylvania, are included in Attachment 2.

- *Ubiquitous availability.* Print, radio and outdoor advertising are not efficient customer acquisition tools if a large share of the listeners or viewers cannot order the service. Radio and television advertisements do not adhere to ILEC central office boundaries – a patchwork network cannot efficiently and effectively utilize mass marketing tools to reach the mass market. To be effective, service must be available *throughout* a particular region to *as broad a potential mass market customer base as possible*. Partitioning availability (such as on a central office basis) is the kiss of death for an effective mass marketing advertising campaign.

- *Minimal manual processing, low activation costs.* Processes must be automated to the greatest extent possible. Each time a carrier has to "touch" a customer (e.g., install a line, repair service, answer a billing question), the carrier incurs costs that it must "make up" by monthly gross margin on the customer. If the costs of "touching" the customer are significant, serving the customer may never be profitable, given the high degree of churn and the inability to sign term contracts with mass market customers.

- *Reliable service.* This goes without saying. Since customers demand high-quality service and will not tolerate cut-over mistakes or delays, the new entrant must not present those difficulties. Mass market consumers are far less likely to be equipped to handle or address reliability or billing problems than large enterprises.

- *Low fixed costs***.** Because of the high degree of churn, the presence of any high fixed costs is fatal to efforts to serve the mass market. Mass market CLECs must rely on rock-solid provisioning methods. The high rate of churn also means that a CLEC must serve a *large* portion of the market in order to cover large fixed costs. It is axiomatic that the lower the fixed costs, the lower level of penetration a CLEC must achieve to be successful.

In short, the target market for the mass market services that Z-Tel "seeks to offer" has distinctive characteristics and requirements. If Z-Tel's deployment strategy cannot meet those requirements because of restrictions on the availability of the UNE platform,

then Z-Tel will not be able to expand to serve new customers and it (and similarly-situated CLECs) would be impaired. As further set forth below, it is clear to Z-Tel that without unbundled local switching and the UNE platform, Z-Tel would not be able to provide these services on the scale and level of ubiquity necessary to meet customer expectations.

2. The Costs of Self-Provided Switching Impair Mass Market Entry.

The *UNE Remand Order* correctly emphasized that the impairment analysis must take into account not only the "direct cost of purchasing" switches, but also "*all of the costs* that requesting carriers would incur" to self-provision switching.[72] Z-Tel has analyzed the possibility of self-provisioning switching in New York City, and concluded that those additional costs – and particularly the costs of manual hot cuts and costs of hot cuts – would vastly exceed the cost of the switch itself.

After the start of the ongoing wave of CLEC bankruptcies, when switches had become available at distressed, below-cost prices, Z-Tel located a DMS 500 with 39 fully-wired New York City collocations available for about $1.5 million. Even adding the costs of upgrading the switch from its initial capacity of 37,000 to 68,000 lines, and of providing the additional wiring needed for start-up, the total cost of the switch came to "only" about $5.5 million. Compared to per-switch costs of approximately $25 million reported by other CLECs,[73] this price initially seemed like a bargain. And Z-Tel already had more than enough customers (over 100,000 in New York City) to fill the switch.

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[72] 15 FCC Rcd. at 3734 (emphasis added).

[73] *See, e.g.,* Excerpt from Allegiance Telecom's year 2000 10K filing (Attachment 5).

Z-Tel quickly discovered, however, that equipment costs were only the tip of the iceberg in migrating from a UNE-P to a "UNE Loop" (or "UNE-L") strategy. First, before Verizon would let Z-Tel utilize the 39 collocations, it insisted on full payment by Z-Tel of amounts owed by the *now-defunct CLEC* – approximately $4 million. Z-Tel estimated that additional one-time expenditures for upgrades and related hiring and training of personnel would also be necessary. In addition, Z-Tel would be required to make substantial monthly payments for site rental and power costs. The Commission must take the impact of these costs into account, as well as that of the switch itself.

In addition, it is important to consider the cost of hot cuts and the regulatory risk of change in these costs. Until recently, the cost of hot cuts in New York was $24. On the basis of evidence presented by Verizon, however, the New York Public Service Commission concluded earlier this year that the true cost of a hot cut in that state is more than $185. The NYPSC then adopted a settlement (supported by Verizon) in which Verizon agreed to provide rebates to requesting carriers for the next two years that will bring the cost of a hot cut down to $35.[74] The NYPSC and Verizon still maintain that $185 is the TELRIC-compliant nonrecurring rate.[75] Therefore, for purposes of *this*

[74] *See Verizon New York*, Order Instituting Verizon Incentive Plan at 7, Case 00-C-1945 (issued February 27, 2002). As explained by NYPSC staff, a key part of the settlement was "[a] non-recurring charge of $35.00 for UNE hot cuts as opposed to the approximate $185.00 charge contained in the Commission's UNE decision." *Verizon New York*, Prepared Testimony of PSC Staff, Case 00-C-1945 (Feb. 2002), at 24. That decision was the one that "increased this charge from about $24 to more than $185." *Id*. at 10.

[75] In fact, Verizon has recently vigorously defended the $185 charge in its Supplemental Section 271 Application for New Jersey, a state that has implemented similarly high hot-cut nonrecurring charges. *See Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in New Jersey*, Supplemental Filing of Verizon New Jersey, CC Docket No. 02-__ (March 26, 2002), at

review, the Commission must consider the impact that the $185 charge has on the business case for mass market entry in New York.

According to Z-Tel's business model, *even if a switch in New York City were free*, it would never be profitable to deploy a switch and serve mass market consumers if CLECs had to pay $185 per customer up front. That is not surprising. As discussed above, given the high degree of churn and relatively low monthly revenues for mass market consumers, it is nearly impossible to recoup this nonrecurring charge over the entire customer base. Self-provisioning switching would save Z-Tel $15 per month in unbundled local switching charges.[76] But at $185 for each conversion, Z-Tel would lose many of its customers to churn well before it could accrue savings sufficient to equal the nonrecurring hot cut cost. And, of course, for switch deployment to make economic sense, Z-Tel would need to recover the costs of the switch, and collocation and operational costs as well.

This analysis places the current debate in proper perspective. The ILECs may note that switches are relatively inexpensive and argue on that basis that CLECs are not impaired without access to unbundled switching. But the cost of the switch is actually much less important than the costs resulting from manual hot cuts, and the start-up expenses and recurring costs accompanying collocation.

As the Commission concluded in the *UNE Remand Order*, it is clear – at least in connection with serving mass market customers in New York – that Z-Tel would be

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12-19 (stating that "[t]he new [$35] rate is a small fraction of what both the New Jersey and New York commissions have determined is the appropriate TELRIC rate").

[76] Z-Tel pays Verizon more than $15 per month per customer, which includes approximately $8 for switching and approximately $7 for those vertical features that only can be provided through the local switch.

impaired "in [its] ability to provide service . . . because of the costs of self-provisioning and switching in th[at] market[]."[77] Because of the density of customers in New York City, it likely presents a "best-case scenario" for self-provisioning switching to serve the mass market. If self-provisioned switching cannot be used economically to serve the mass market there, it would be unreasonable for the Commission to presume that it could be utilized economically anywhere.

In addition, in assessing costs, the Commission must consider the relative cost of capital CLECs face *vis-à-vis* their ILEC rivals. At this time it is impossible for most CLECs to obtain significant capital and those that can must pay rates significantly higher than those available to ILECs.[78] A significantly higher cost of capital can, by itself, impair CLECs in the absence of the availability of UNE platform. Section III of Attachment 4 provides a detailed study of the vastly different cost-of-capital environment that CLECs face as opposed to their ILEC competitors. That cost-of-capital differential helps to explain the carnage experienced by the CLEC industry over the last two years. At a basic level, the economic cost of a $5 million piece of network equipment is simply far greater to a CLEC than to an ILEC.

Moreover, because ILECs possess economies of scale and scope, they can purchase switches from vendors at considerable volume discounts that are simply not available to companies like Z-Tel. The NYPSC recently reduced costs for unbundled

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[77] *UNE Remand Order*, 15 FCC Rcd. at 3810-11.

[78] As Z-Tel CEO Gregg Smith stated during his February 2002 earning call: "[W]here the stock is and where the debt market is, . . . we are just going to have to grow the business at the best rate we can given our ability to internally generate cash. . . . Until we are able to get money at attractive terms, we are just living out of our checkbook."

local switching based on the "deep discounts" that Verizon is able to obtain when it purchases switches from vendors like Lucent and Nortel.[79]

When one combines the ILECs' ability to purchase switching and other network facilities at steep volume discounts and the high debt and equity costs for CLEC capital, the cost of capital calculations in Attachment 4 are not surprising. Wall Street and the investment community have not been slow to recognize the advantages of scale, scope, and density that ILECs have over their CLEC rivals in providing local telecommunications services. And Wall Street's reward for those economies is a sharply lower cost of capital for ILECs than CLECs. In analyzing whether CLECs face substantially higher costs in deploying network facilities, the Commission cannot ignore these substantial cost-of-capital differences.

3. The ILECs cannot perform hot cuts in sufficient quantities to sustain self-provisioned switching in a competitive market.

As discussed above, the mass market consists of over 140 million analog POTS lines nationwide. Many states have millions of lines – New York, for example, has over 10 million analog POTS lines. The ILECs have not shown that they have the capability to perform cutovers in the large volumes necessary to support widespread competitive entry. In fact, hot cut capacity is sharply and inherently limited by two important factors: (1) the labor-intensiveness of the process and the corresponding need for highly trained personnel; and (2) the practical limitations on how many hot cut teams can work simultaneously on a single main distribution frame without interfering with each other's work.

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[79] *See Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*, Order on Unbundled Network

Z-Tel's recent experience with Verizon in New York confirms that limitations on hot cut capacity represent an enormous barrier to widespread self-provisioned switching for the mass market. In 1998, Z-Tel launched residential, competitive local exchange service in New York State using the UNE platform. By the spring of 2001, Z-Tel was providing over 100,000 customers an innovative bundle of services including local calling, long-distance, and a variety of unique enhanced services. Most of those customers were in New York City's densely populated LATA 132.

As New York consumers' acceptance of Z-Tel's innovative services outstripped expectations, two factors impelled the company to analyze the feasibility of self-provisioned switching. First, and most obviously, buying unbundled switching from Verizon is expensive – at a cost of approximately $15 per month per line, Z-Tel's total annual cost for unbundled local switching in New York was more than $10 million. Equally important, Z-Tel had found that buying a critical service from an incumbent monopolist that is also Z-Tel's largest competitor imposes an unfortunate array of "soft" costs, in addition to the "hard" costs of the switching itself. These additional costs of dealing with Verizon include the labor costs for personnel dedicated to interacting with the ILEC, the ongoing risk of discriminatory treatment, and Z-Tel's inability to diagnose and address problems arising from the use of Verizon's facilities.

Careful analysis, however, shows that a number of serious problems would accompany any attempt to self-provision switching. Verizon's hot-cut capacity limitation is the most intractable.[80] After discussions with Verizon, Z-Tel concluded that it could

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Element Rates, Case 98-C-1357 (issued January 28, 2002), at 21.

[80] Further problems of cost, delay, and reliability are discussed below.

not expect to convert more than 4,000 customer lines per month in LATA 132.[81] And even this was an optimistic assumption. According to performance data filed with the NYPSC throughout 2001, Verizon on average provided about 12,500 hot-cuts to all CLECs combined per month.[82] Therefore, in analyzing the feasibility of self-provisioning switching in New York, Z-Tel assumed that it would be able to garner in that one city 25% of the hot cuts that Verizon was providing on a statewide basis – and this in a state where the FCC has reported that 23 CLECs were operational as of June 30, 2001.[83]

This limitation on the number of customers Z-Tel could put "on-switch" had a significant impact on the economics of Z-Tel's decision. As discussed above, Z-Tel had to consider that its mass market customer base would have a "churn" rate of 4% per month. At that rate, servicing the churn alone on a single 68,000 line switch – once it were filled to capacity – would require nearly 3,000 hot cuts a month. To service the churn on Z-Tel's over 100,000 LATA 132 customers, more than 4,000 cutovers per month would be needed. Clearly, then, the churn alone on self-provisioned switching for

[81] *See* Declaration of Peggy Rubino on Behalf of Z-Tel Communications, Inc., ¶ 36 ("Rubino Decl.") (Attachment 6).

[82] Verizon's "East New York Performance Assurance Plan Results," located at http://128.11.40.241/east/wholesale/resources/res_ny_perf_assur_plan_results.htm, indicate the number of hot cuts that Verizon performed for CLECs during nearly every month since January 2000. Excluding August and September, 2000 (during which there was a Verizon worker strike), the monthly average number of hot cuts performed by Verizon during the months covered by these reports was 12,422.

[83] *See* FCC Report, *Local Telephone Competition: Status as of June 30, 2001* ("2001 Local Competition Report"), Table 8. The Report is available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0202.pdf.

mass-market customers would greatly overwhelm Verizon's hot cut capacity in LATA 132.

But merely servicing churn is *not*, of course, the primary goal of the cutover process – customers must also be transitioned from the ILEC switch to the CLEC switch in the first place and Z-Tel hopes to *increase* the number of customers it serves. In New York, recent data show that about 7.5% of CLEC access lines change in a typical month – a figure that reflects growth as well as churn.[84] Z-Tel calculated that, given the hot cut capacity constraints, it would take over *three years* to bring a single 68,000 line switch up close to capacity.[85] And during that entire time, Z-Tel would not only be paying for the under-utilized switch itself, but also for the entire costs of collocation rental and power, as well as additional overhead costs (such as maintenance) that are not significantly less for a nearly empty switch than for a full one.[86] Verizon's hot cut capacity constraints thus not only represent an absolute (and very low) ceiling on the total number of customers for whom Z-Tel could ever self-provision switching, but also an enormous economic disincentive to adopting *any* self-provisioned switching at all. These problems, moreover, are not unique to Z-Tel. Rather, they are inherent to the provision of mass-market analog services.

On a monthly basis in New York, Verizon routinely handles more than 300,000 UNE-P and UNE-P style conversions.[87] In the absence of unbundled switching, Verizon

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[84] *See* Attachment 4 (Z-Tel Policy Paper No. 5), at 9-10 & n.9.

[85] With only 4,000 hot cuts per month available, two such switches could *never* be brought on-line.

[86] *See* Attachment 6 (Rubino Decl.), ¶ 37.

[87] By "UNE-P style conversions," Z-Tel refers to Verizon's mass-market retail provisioning processes, which are as mechanized as UNE-P installations. The New York

would, of course, need sufficient capacity to *manually* provision and support CLEC growth to competitive market levels, transition *all* New York lines currently served by UNE-P to CLEC switches, and service the churn on *all* of those lines. But as Z-Tel's analysis showed, it takes aggressive assumptions to suppose that Verizon could come close to handling the churn on Z-Tel's existing customer base, let alone allowing Z-Tel and other CLECs to grow that share to fully competitive levels. At the same time, Verizon would not be dependent on this degree of manual provisioning to support its own mass market customer base, a situation that would result in considerable discriminatory impact. Accordingly, it is clear that a fully competitive market in New York would require hundreds of thousands more conversions per year than Verizon has shown that it could ever perform, notwithstanding that Verizon has more "hot-cut" experience than any other incumbent.[88]

Commission considers these Verizon retail provisioning figures to be the retail analog to UNE-P conversions for purpose of the New York State performance compliance plan.

[88] There is, moreover, no reason to believe that the hot-cut capacity problem is limited to Verizon. Attachments B and C to the Rubino Declaration (Attachment 6) detail the highly complex BellSouth hot-cut process. BellSouth has only provided a few thousand hot-cuts per month in Georgia and Louisiana, and competitors have argued that upwards of 25% of those hot-cuts were performed incorrectly. *See* Opposition Comments of KMC Telecom, Inc., *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35 (March 4, 2002), at 6 ("KMC BellSouth Comments").

Compare this experience with BellSouth's ability to provide UNE Platform orders. BellSouth recently boasted that it was able to convert about 48,000 lines to the platform in one month. *See* Letter from Jonathan B. Banks, BellSouth, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 01-277 (filed Nov. 1, 2001). That is more than the *total number* of UNE loop lines in service in the BellSouth territory three years after passage of the 1996 Act.. *See* FCC, *Selected BellSouth Data for its ILEC Operations in Georgia and Louisiana, as reported on FCC Form 477*, http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/477se101.pdf.

As a result, any decision by the Commission requiring transitioning from UNE-P to UNE-L entry will, as a practical matter, impose a cap on competitive entry as a result of the manual process and inherent limitations of the ILEC hot cut capacity. The ILECs, of course, are well aware that relying on UNE-L for mass market entry will cap competitive entry – and cap it at a very low level. While that works to their benefit, this Commission should not impose rules that would severely limit the options available to residential and small business customers.

In short, although the Commission's conclusion in the *UNE Remand Order* that "the cost, quality, ubiquity and timeliness factors in [its] 'impair' standard" indicate that lack of unbundled switching would impair the ability of a requesting carrier to provide service to consumers was clearly correct, [89] the Commission need not even examine all of those factors to find impairment. Servicing competitive entry for the 160 million-plus lines possessed by incumbent LECs nationwide would require the ability to handle literally millions of installations and change orders – approximately 3.2 million per month just for churn at a four percent rate if competitors had a fifty percent market share. That is more hot-cuts in one month than the total number of UNE-Loop lines in service as of in June 30, 2001 – more than five years after passage of the 1996 Act.[90] Clearly, the ILECs have no chance of handling even a fraction of the 3.2 million hot cuts per month necessary to support mass-market entry.

It is time for the Commission – and the ILECs – to be realistic. If the Commission put all of its hopes for mass-market competition in the basket of manually-

[89] *UNE Remand Order*, 15 FCC Rcd. at 3810.

[90] 2001 Local Competition Report at Table 4 (reporting 3.161 million lines provided *via* "UNEs without Switching").

provisioned hot-cuts, *at best* the result would be substantial order backlogs and frequent customer complaints. At worst, entrants would not even bother to try. The UNE platform can handle these volumes because provisioning of the loop-switch combination *can* be mechanized to support mass-market entry. In short, CLECs would clearly be impaired absent access to unbundled switching.

3. Mass market customers will not tolerate the reliability and delay problems inherent in the hot-cut process.

As the *UNE Remand Order* recognized,[91] in addition to the cost and capacity concerns discussed above, CLEC efforts to self-provision switching also must confront the reliability and delay problems stemming from the hot-cut process. Independent of capacity and cost, these problems would impair Z-Tel's ability to serve its mass market customers in the absence of unbundled local switching.

As the attached Rubino Declaration sets forth in detail,[92] the hot-cut process requires ILEC technicians to manually disconnect the customer's loop from the ILEC switch and reconnect it to the CLEC's switch, while simultaneously reassigning the customer's original telephone number from the ILEC switch to the CLEC switch. The ILECs have emphasized the complexity and large number of steps involved in manually cutting over individual lines at their central offices.[93] As the Commission recently observed, "ensuring that a hot cut is provisioned correctly with coordination between [the

[91] 15 FCC Rcd. at 3817-20.

[92] *See* Attachment 6 (Rubino Decl.), ¶¶ 7-22

[93] *Id.*, Attachments A and B.

ILEC] and the competing carrier is critical because problems with the cutover could result in extended service disruption for the customer."[94]

As a result of the complex and labor-intensive nature of the process, a hot cut clearly cannot be performed on a moment's notice. As the Commission concluded in the *UNE Remand Order*, the "time needed for incumbent LECs to complete coordinated loop cutovers" contributes to "a material delay on competitive LECs that offer services using self-provisioned switching."[95] In contrast, UNE platform migrations can be performed in a matter of hours – not days.

More importantly, however, the hot-cut process is notoriously error-prone. As a result, service disruptions resulting from hot cuts are commonplace in today's market, even though CLECs today seek to serve with their own switches only a small fraction of customers that they would presumably have in a fully competitive market.[96] Common service disruptions resulting from hot cuts include complete loss of service, disconnection of calls already underway, and the possibility that inbound calls will not be successfully routed to the customer. In the pending BellSouth Georgia/Louisiana 271, KMC

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[94] *Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, CC, Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238, at n.708 (2000) (internal citation omitted).

[95] *UNE Remand Order*, 15 FCC Rcd at 3817.

[96] Moreover, nearly all CLECs currently serving customers with their own switches are doing so using DS1 or higher capacity lines. Using a DS1 line, a CLEC can move the equivalent of 24 analog lines with far fewer opportunities for disruption than if 24 separate hot cuts had to be performed. Expanding self-provisioned switching to the mass market will thus vastly increase the occurrence of service disruptions.

highlighted its significant and substantial problems with BellSouth's "hot cuts" in Georgia, noting that in August 2001 over 25% of its hot-cuts went awry.[97]

Service disruptions run the risk of a large number of consumer service-quality complaints to state commissions and the numbers will surely increase dramatically were self-provisioned switching for the mass market to become more widespread. It is important to note that the problems are already clearly evident at the relatively low levels (a few thousand per month) of hot cuts provided today. Imagine the scale and scope of service disruption, consumer complaints, and delay that would emanate from the 3.2 million hot cuts per month that would be needed to support competitive service to the mass market. Even if only 5% of hot cuts "go bad" (another aggressively optimistic assumption, given KMC's experience with BellSouth), the Commission would set in motion a process that could disrupt and possibly disconnect over 160,000 customer lines per month and nearly 2 million customer lines per year.[98] Customers would not tolerate that kind of unreliable service.[99] And that is surely not what Congress meant when it said it wanted to see mass market competition.

The delay and disruptions that would inevitably result from a large volume of hot cuts would severely impair Z-Tel's ability to attract customers to its unique bundled

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[97] *See* KMC BellSouth Comments, at 6.

[98] UNE platform-based services – which keep loop-switch combinations in place – can, of course, be provided on a seamless and mechanized basis, similar to the ILEC retail process.

[99] Incumbent LECs *already* exploit CLEC provisioning difficulties in their advertising campaigns. For example, SBC has billboards in the Chicago with the picture of particularly risk behavior (like putting one's tongue on a frozen lamppost) with the phrase, "Bad Idea: Kind of Like Switching Your Local Phone Company." SBC has launched a television advertising campaign with a similar theme. *See* Eric Zorn, "Press 1

services. As a result of decades of extremely reliable – albeit economically inefficient – dialtone service from the Bell System, mass market customers now expect such service, and have a low tolerance for disruptions. But the potential savings that mass market customers can experience by switching providers of phone service are relatively modest – frequently less than $10 per month – unlike the savings for large companies, which may represent thousands of dollars a year. Mass market customers are likely to be persuaded to change carriers on account of innovative services rather than by the prospect of saving money. However, the promise of new services and marginal savings are unlikely to justify a change of service provider if the mass market customer perceives a risk of service disruption. Additionally, for customers who do attempt to switch, a single hitch or delay in the cutover process may be sufficient to convince the customer to return to the incumbent. And those consumers are likely to tell their friends and acquaintances about the problems they encountered when they tried to switch local phone service.

Significantly, the reliability concerns introduced by the hot-cut process cannot be addressed through better enforcement of Commission rules already in place, or indeed, through the adoption of new rules or guidelines for cutovers. Due to the complexity and the labor-intensive nature of the cutovers, a high error rate and accompanying service disruptions are inherent in the process. And those service disruptions will, of course, fundamentally influence customer *perceptions* of CLECs' ability to provide quality service, and thus CLECs' ability to attract customers.

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if you find Ameritech TV ads ironic," *Chicago Tribune*, April 2, 2002, http://www.chicagotribune.com/news/printedition/chi-0204020123apr02.story.

4. The deployment of switches by some CLECs does not prove that CLECS serving the mass market are not impaired without unbundled local switching.

Verizon contends that the deployment of switches by some competing carriers demonstrates that CLECs are not impaired without access to unbundled local switching.[100] This argument has, of course, already been rejected by the Commission, and is, in any event, logically flawed. Moreover, experience since 1999 shows that many CLECs are impaired without access to unbundled switching.

The ILECs made this same claim at the time of the Commission's *UNE Remand Order*.[101] The Commission – while acknowledging that "approximately 167 different competitors h[ad] deployed approximately 700 switches throughout the country"[102] – rejected the ILECs' argument. The Commission correctly explained that the fact that a particular "carrier is collocated in a particular central office and is using unbundled switching does not conclusively demonstrate that a variety of carriers can self-provision switches without significant cost or other impediments."[103] "Indeed," the Commission continued, "based on financial analysts' reports of competitive LECs' operations, a significant number of requesting carriers are not generating net income (*i.e.*, profits)," "although the capital markets appear to be supplying requesting carriers with access to

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[100] *See, e.g.*, Letter of Thomas J. Tauke and Michael E. Glover to Chairman Michael Powell, CC Docket No. 96098 (filed October 19, 2001) ("10/19/01 Verizon Letter"), at 2-6.

[101] *See UNE Remand Order*, 15 FCC Rcd. at 3810 ("[I]ncumbent LECs further argue that the presence of one competitor's switch and collocation in a given market is dispositive of whether requesting carriers generally will be impaired without access to unbundled switching.")

[102] *Id.* at 3809.

[103] *Id.*

capital in the absence of demonstrated profitability."[104] Accordingly, the Commission found, "it is still too early to know whether self-provisioning is economically viable in the long run."[105]

It is no longer too early to know whether capital markets will continue to fund the deployment of facilities by CLECs that are not profitable. They will not. Indeed, the "list of switches" submitted by Verizon in this proceeding in November 2001 is littered with "entrants" that have either disappeared entirely, or are in bankruptcy proceedings. More specifically, Z-Tel's inquiry into the status of the 117 companies Verizon lists as owning switches revealed that nearly one-half are in bankruptcy proceedings, are in significant financial distress (as reported in the press), have no Web site (an obvious indication that they have no current intent to offer mass market services), or could not be found at all. It would not be possible to present a reasoned explanation for why unbundled switching was required in 1999, at the apex of CLEC success in the financial markets, but not today, when it has become so difficult for CLECs to attract capital.

Even apart from its inconsistency with relevant Commission precedent, however, Verizon's argument suffers a fatal logical flaw: The fact that some CLECs have deployed switches to serve the large business or broadband market does not support the conclusion that CLECs are not impaired without access to unbundled switching to serve the mass market. In fact, as a number of CLECs have expressly informed the Commission, CLEC switches generally serve different clients from the mass market customers that Z-Tel attempts to reach using the UNE platform obtained from the

[104] *Id.*

[105] *Id.*

ILECs.[106] Specifically, CLEC-provided switches focus on medium to large businesses requiring digital services (DS1 and above), in concentrated geographic areas. As explained below, hot cuts at the ILEC's central office are not required to transition these customers off the ILEC network. Given these facts, it is not surprising that Verizon does not even attempt to demonstrate that any of the switches on its list are being used to serve residential customers and small businesses.

The Commission should not adopt the "lemmings to the sea" theory of competition propounded by Verizon. The CLEC market carnage of the last few years vividly demonstrates the serious flaw in business plans that rely on constructing telecommunications networks before the company has sufficient customers and cash flow to justify that construction. The Commission should learn from history and provide entrants the means to build a mass market customer base and cash flow. Only the UNE platform – complete with unbundled local switching – can do that.

C. At A Minimum, The Three-Line Rule Should Be Changed To A DS1 Rule.

Although the Commission generally required ILECs to unbundle switching, the *UNE Remand Order* also adopted an exception to this rule: ILECs are not required to provide local switching as an unbundled network element for end users with four or more

[106] *See, e.g.,* Letter from Richard J. Metzger and Patrick Donovan to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98 (filed May 19, 2000), at 2 (indicating that Focal Communications Corporation "concentrates exclusively on customers that have a current need for DS1 communications functionality or higher"); Letter from Genevieve Morelli to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98 (filed July 19, 2000), at 7 (Intermedia Communications'' primary product is designed for customers requiring DS1 connectivity); Letter from Chuck Goldfarb to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98 (filed June 21, 2001), at 2 (WorldCom's facilities-based strategy is used to serve digital customers with either DS1 or ISDN-PRI needs, connecting to digital PBXs that typically aggregate at least 30 analog lines).

lines within density zone 1 in the top 50 metropolitan statistical areas ("MSAs") where they are providing nondiscriminatory, cost-based "extended enhanced links" ("EELs") for end users.[107] CLECs are entitled to access to unbundled switching only to serve customers with three or fewer lines. This "three-line rule" does not reflect the real-world economics of serving a customer through self-provisioned switching, and should be changed to reflect those economic realities. For the reasons set forth below, Z-Tel believes that the cut-off for mandatory unbundling of local switching in the top 50 MSAs should be set at the DS1 level, or about 18 lines.

In the *UNE Remand Order*, the Commission candidly acknowledged that "[n]o party in this proceeding . . . identifies the characteristics that distinguish medium and large business customers from the mass market."[108] The Commission therefore arrived at the three-line rule on its own, based on its views: (1) that the rule would capture "virtually all" residential customers; and (2) that any business with three or fewer lines "is likely to share more characteristics of the mass market customer than a medium and large business."[109] However, these limited efforts to justify the three-line rule bear little relation to the basic impairment analysis – including the cost, reliability, and delay factors discussed in Parts II.B.1-3, *supra* – set forth by the Commission in the *UNE Remand Order*.

In fact, as a number of parties explained in prior proceedings that the Commission has incorporated into this record, those factors apply no differently to a customer with

[107] 15 FCC Rcd at 3823.

[108] *Id.* at 3829.

[109] *Id.*

four lines (or five, or six, etc.) than to a residential end user with a single line.[110] No party has even suggested that service for such small business and large residential customers would be provided by any method other than manual cutovers.[111] And the coordinated hot-cut process obviously imposes the same problems of cost, delay, and reliability regardless of whether one loop or five are being moved.

These practical and economic considerations change only when it becomes viable to aggregate loops at a customer location and provide service at a DS1 interface or higher. If a customer has enough lines to justify the expense of purchasing multiplexing equipment and a high capacity line, it makes sense to aggregate the customer's loops at the customer's premises, which avoids the need for hot cuts at the ILEC's central office. Indeed, it is likely that the customer's loops already have been aggregated at the customer's premises if the customer has a large number of lines. Aggregating a small number of loops, however, does not make economic sense, on account of the expense of the multiplexing equipment and the high capacity line.[112] Like other commenters, Z-Tel estimates that

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[110] *See, e.g.*, Reply of Birch Telecom, Inc. to Oppositions to Its Petition for Reconsideration at 6-11, CC Docket No. 96-98 (filed April 3, 2000) (arguing that cut-off should be at DS1 level) ("Birch Reply"); Comments of Cable & Wireless at 4, CC Docket No. 96-98 (filed March 22, 2000) (DS-1); Petition of MCI WorldCom for Reconsideration at 22, CC Docket No. 96-98 (filed February 17, 2000) (DS-1); Petition for Reconsideration and Clarification of Sprint Corporation at 8-9 (filed February 17, 2000) (urging cut-off at 39 lines).

[111] *See, e.g.,* AT&T Corp's Petition for Reconsideration and Clarification of the *Third Report and Order* at 12-17, CC Docket No. 96-98 (February 17, 2000) ("There is no evidence on the record which suggests that carriers can serve customers with four, five, six, or seven lines through anything other than the manual conversion 'hot-cut' process.").

[112] As an expert for AT&T concisely explained in conjunction with its Petition for Reconsideration of the *UNE Remand Order*:

aggregation typically becomes economically viable at about 16-20 lines, and that estimate is supported by substantial evidence on the record.[113] Therefore, aggregating loops at the customer's premises (thus bypassing the hot-cut process) is practical only for large customers with a substantial number of voice lines.

The three-line rule is also inconsistent with marketing realities. Indeed, Z-Tel does not generally even try to sell its small business product, Z-LineBUSINESS, in areas where the restriction applies. That is because it is a mass market product that depends on mass marketing techniques and the costs of marketing are driven up, in effect, when the target audience is reduced. For example, a newspaper advertisement or a radio commercial will cost a certain amount, and it will make sense to advertise if the success rate is high enough to justify the cost of the commercial. But if a significant portion of the target market may not buy the product even if it wants to do so, the cost to acquire a customer increases. Making businesses with four to 18 lines ineligible to buy Z-Tel's service – even though that is a market that should find Z-Tel's service extremely

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> Regardless of how many loops are being aggregated at a customer's location, the customer or carrier must deploy the following equipment and facilities: (a) customer premises equipment to terminate and multiplex the customer two-wire voice circuits; (b) a facility between the customer premises and the carrier's network that is capable of supporting multiplexed voice communications; (c) network equipment capable of interfacing the multiplexed voice communications onto an interoffice transport network; (d) an interoffice transport network; and (e) equipment to connect the transport network with the local switch.

Id., Exhibit A at 2 (affidavit of Mr. Richard Chandler).

[113] *See, e.g.*, Birch Reply at 8-11 (analysis of level at which it becomes viable to aggregate lines and provision a DS1 concluding that "the economic crossover is between 17 and 20 lines per locations"); Chandler Affidavit at 2 ("Aggregating customer demand

attractive – will increase Z-Tel's cost to acquire customers and make the cost of customer acquisition prohibitive where the restriction applies.

Moreover, the restriction reduces competition even in areas where it does not apply. Of course, newspapers are distributed and radio signals are carried without respect to density zones. Because mass marketing is ineffective if it reaches individuals who cannot buy the advertised service, it does not make sense for Z-Tel to advertise in a top 50 MSA where the restriction applies, even if there are many businesses outside Density Zone 1 that might prefer Z-Tel service. Z-Tel would be paying to reach too many businesses in Density Zone 1 who could not purchase Z-Tel service to make mass market advertising effective under the three-line rule. And as discussed in Section II.B.1 above, mass marketing advertising is the only effective alternative to serve mass market consumers.

Recognizing these realities, the New York Public Service Commission recently adopted an 18-line rule – for a period of at least two years – in a proceeding[114] intended to ensure the "development of a vibrant competitive marketplace" for local communications service in New York.[115] As the PSC staff explained, "UNE-P will be available throughout Verizon's territory to serve small business customers, small being

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at a given location using traditional DS1 facilities . . . is practical only for large customer locations having about sixteen or more voice lines.").

[114] *Verizon New York*, Order Instituting Proceeding at 1-2, Case 00-C-1945 (issued November 3, 2000).

[115] The NYPSC also convened a Bottleneck Elimination Task Force, which is to report to the NYPSC in six months on the bottlenecks CLECs face in obtaining hot-cuts, with particular emphasis on migrating customers from UNE-P to unbundled local loops. That Bottleneck Elimination Task Force recently began its work and is scheduled to report its recommendations in September 2002.

defined as under 18 lines."[116] According to the staff, "[t]he expanded availability of the UNE-P for small business customers . . . will introduce greater competition into the small business market and strengthen opportunities for economic development."[117]

The New York PSC's decision to align the cut-off for the availability of unbundled switching with the economics of self-provisioning switching will have a major impact on Z-Tel's ability to serve small business customers in the New York market. As Z-Tel observed in its comments on the New York plan: "With the assurance that the UNE-P will be available for at least two years for customer with 18 lines or less, Z-Tel will be able to dedicate resources to introducing its small business product to customers in New York . . . . Raising the . . . limitation from four to eighteen [lines] also greatly expands the pool of customers that can take advantage of Z-Tel's small business offering."[118] The end result in New York will be more competition, a broader array of service offerings, and lower prices for small businesses and large residential customers.

In sum, the Commission's three-line rule – which, as the *UNE Remand Order* acknowledged, lacks any empirical foundation – should, at the least, be changed to reflect the economic reality that serving customers with four or more lines poses the same problems of cost, delay and reliability as serving smaller customers unless it is practical to aggregate the lines and provision a DS1 loop. The evidence in the record and the New York PSC's recent decision indicates that the level at which a DS1 reaches economic

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[116] *Verizon New York*, Prepared Testimony of PSC Staff, Case 00-C-1945 (February 2002).

[117] *Verizon New York*, Order Instituting Verizon Incentive Plan at 15, Case 00-C-1945 (issued February 27, 2002).

viability is about 16-20 lines. Accordingly, that – and not the three-line level adopted by the Commission – is the appropriate dividing line between the mass market and the market for medium and small businesses.[119]

Z-Tel does not contend that CLECs seeking to serve customers with more than 18 lines are not impaired without access to unbundled switching. That is not the market Z-Tel seeks to serve. But if the Commission continues to make switching available only to serve mass market customers, the line defining that market should be raised from three to 18.

D. The Availability Of Automated Hot Cuts Would Change The Impairment Analysis, But The Commission Should Not Adopt A "Trigger" With Respect To Switching.

The Commission raised a number of specific questions relating to triggers for changes in UNE availability.[120] As discussed below, a trigger that made certain network elements unavailable at a predetermined time should not be adopted because it would be contrary to the terms of the statute. Nor should the Commission adopt a trigger based on switch deployment by some CLECs, because switch deployment by bankrupt CLECs or

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[118] *Verizon New York*, Statement of Donald C. Davis on Behalf of Z-Tel Communications, Inc. in Support of the Joint Settlement Proposal at 5, Case 00-C-1945 (February 12, 2002).

[119] The Commission asked "whether the availability of the EEL combination serves to address impairment that would otherwise exist in the absence of unbundled switching." *NPRM*, ¶60. The availability of the EEL by itself does not relieve the impairment to CLECs seeking to serve residential and small business customers. But it is nevertheless important that the EEL be available to competitors. A CLEC that served small and medium businesses in a geographic area – but still a very small percentage of customers compared to the ILEC – might want to deploy a switch to serve those customers, but find that multiple collocation costs resulting from its small market share made that decision impractical. In those circumstances, the CLEC might choose to use EELs to reduce its collocation costs.

[120] *NPRM*, ¶¶ 45-46.

by CLECs providing broadband service or service to large businesses says nothing relevant about voice service for mass market customers. In our view the Commission should not adopt any trigger for the availability of the components of the UNE platform, but should analyze changes after they have been made under the appropriate statutory standards before modifying the unbundling rules.

1. There is no basis for triggers based on temporal boundaries or on the number of CLECs that had deployed switches.

The Commission asked "whether, consistent with the statute, we can or should impose absolute temporal boundaries on UNE availability, including approaches in which the requirements that incumbents unbundle specific network elements would sunset as of a date certain."[121] Temporal boundaries would be contrary to the requirements of the statute. Section 251(c)(3) requires ILECs to make network elements available and section 251(d)(2) directs the Commission to consider whether CLECs would be impaired without access to specific elements. A temporal boundary would be contrary to those provisions, because it would restrict the availability of access to elements regardless of the result of the inquiry under the statutory provisions.

In addition, as discussed above, Congress required that loops, transport, and switching, at a minimum, be provided by BOCs on an unbundled basis. A temporal boundary on the availability of those elements from BOCs would be contrary to the checklist. Congress specifically prohibited the Commission from deleting items from the checklist and gave section 271 special treatment in the forbearance provision. Accordingly, as stated above, if the BOCs want to be relieved of the obligation to make loops, transport, and switching available, they must seek forbearance and demonstrate not

only the general requirements for forbearance, but also that section 271 has been fully implemented.

In the NPRM, the Commission also noted Allegiance's proposal that CLECs would be deemed unimpaired in their ability to serve business customers in an MSA if four CLECs had deployed switches there and EELs were available. Whatever merit that approach may have with respect to medium and large businesses (properly defined) – and Allegiance's proposal by its terms would apply only to that market – the proposal has little relevance with respect to the mass market customers Z-Tel seeks to serve. As set forth in Part II.B.2-4, *supra*, problems of cost, delay, and reliability render self-provisioned switching for mass market consumers practically and economically unworkable.

Moreover, the Commission should be skeptical of approaches that deem CLECs not to be impaired on account of the actions of other CLECs. At the least, the Commission should inquire whether the CLECs that have taken a particular approach are in bankruptcy proceedings before determining that other CLECs would not be impaired if they took that approach. In addition, the Commission would be required to inquire concerning the use to which the switches had been put and could be put. The deployment of switches to provide broadband service or to serve large businesses says nothing relevant about the needs of CLECs seeking to provide voice service to mass market customers.

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[121] *NPRM*, at ¶ 45.

2. Although reliable and inexpensive automated hot cuts would help to relieve CLEC impairment, a trigger is not consistent with the statute.

There is some potential merit to the suggestion that the Commission might "limit the availability of UNE-P to circumstances where an incumbent continues to use manual cutovers to provision unbundled loops, as opposed to those circumstances where the incumbent has automated the cutover process, such as by deploying digital cross-connects."[122] Z-Tel agrees with the Commission's statement that CLECs "view the incumbent's switch less as an independent network element than as a dependable method of obtaining access to the incumbent's loops"[123] because, as explained above, CLECs are impaired absent access to the platform largely on account of the costs and delays caused by manual hot cuts. Indeed, as discussed above, it is the combination of loops and switch ports that the ILEC can provide to itself on an efficient basis that allows the ILEC to serve the mass-market. A CLEC competing against the ILEC to serve that market must have the tools to compete on a level playing field.

An automated cutover process, if comparable in cost and reliability to the process for switching a consumer's long-distance carrier, has the potential to impose minimal costs and delays and therefore would relieve some of the impairment. But automated cutovers are a necessary but not a sufficient condition for eliminating unbundled switching. Automated cutovers by themselves would not relieve the impairment resulting from the ILECs' efficiencies of scale and scope. For example, automated cutovers would not change the facts (discussed in Attachment 4) that CLECs' cost of capital is

[122] *NPRM*, ¶ 46.

[123] *NPRM*, ¶ 59.

substantially higher than the cost for ILECs, and that ILECs can obtain "deep discounts" on purchases of switches by virtue of their dominant market position. Automated cutovers also would not relieve CLECs of the obligation to hire personnel, rent collocation space, and perform all of the other tasks discussed above.

The Commission's suggestion in the NPRM intended to respond in part to that problem is inadequate. Specifically, the Commission suggests that a CLEC using UNE-P be required to migrate customers to its own facilities only after "it begins providing service to a sufficient number of customers served by a single central office."[124] Even if a CLEC has a sufficient volume of customers in a particular central office, that fact alone does not change the other impairment and cost factors discussed above. The CLEC is attempting to compete with the ILEC's legacy of scope and scale resulting from its decades as a franchised monopolist – the level of ubiquitous entry required by a CLEC to even approach those efficiencies is far more than what a CLEC could generate from one central office.

Broadview's proposal, also mentioned in the NPRM, calls for CLECs ultimately to serve "no more than 50 percent of their customers' access lines using UNE-P" after certain conditions were met.[125] Broadview's proposal does not require automated cutovers and is fatally deficient for that reason. Broadview's proposal does highlight, however, that it would be necessary to give CLECs time to enroll customers using UNE-P and then to transition them to CLEC switches as a sufficient customer base was

[124] *NPRM*, ¶ 46.

[125] *NPRM*, ¶ 45 & n.103.

established.[126] The proposal also is flawed because it provides no rational basis for assuming that "50 percent" of customer lines is the appropriate level for switch deployment. Broadview made no attempt to explain why 50 percent is the magic number for taking away UNE-P access, and the Commission should decline its invitation to engage in arbitrary line-drawing. The losers in such a scenario would be consumers.

It also bears emphasis that, at this time, the question whether inexpensive, automated hot cuts would alleviate the impairment that CLECs would currently experience if they were obliged to self-provision switching is a purely hypothetical one. Z-Tel is not aware of any technology being deployed by ILECs for performing automated cutovers for CLECs, nor of any ILEC claiming that it currently has such capability. Given the time that it will likely take for ILECs to develop an automated hot cut process, the question of the effect of such a process on impairment clearly should be deferred to the next triennial review. In addition, as we have stated, although problems associated with manual hot cuts principally impair CLECs at this time, other factors cause impairment as well. The unavailability of capital is also particularly important. Perhaps the financial constraints will have eased by the next triennial review – time will tell. At this time, however, what is clear is that CLECs are impaired on account of the unavailability of automated hot cuts and that answers the question properly before the Commission.

In any event, adopting a trigger would be contrary to the terms of the statute. Congress did not direct the Commission to adopt triggers. It instead directed the

[126] Even if automated cutovers were available, the Commission should consider whether it would make sense to require CLECs to deploy their own switches since that would tie

Commission to consider whether CLECs would be impaired without access to an element, along with other factors the Commission concluded were relevant to the unbundling analysis. Congress also determined that one class of ILEC – BOCs seeking authorization to enter the long-distance market – must provide loops, transport, and switching until section 271 has been fully implemented and the other requirements of the forbearance provisions have been satisfied. The construction of a trigger would, in effect, prejudge the results of the impairment inquiry or the forbearance inquiry. Such prejudgment is contrary to the relevant statutory provisions, which call for careful consideration of impairment in the case of section 251(d)(2) and the analysis of an array of factors including the effect on the public interest in the case of section 10. Rather than attempting to prejudge matters in advance, the Commission should wait and evaluate unbundling issues at the appropriate time under the governing statutory provisions.

By the time the inquiry under either of those provisions justified the elimination of an unbundling obligation, CLECs will likely have taken steps to obtain access to the function served by the element at issue from sources other than the ILEC. CLECs do not want to depend on their rivals' networks. As long as they are dependent on the ILECs, the ILECs will continue to figure out ways to drive up their costs, and the Commission will never be able to eliminate all the slow rolling and other soft costs ILECs can impose on CLECs. So a CLEC that would not be impaired if it self-provisioned an element or obtained it from another source will do so because business considerations will demand that it do so.

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the CLEC to the ILEC's facilities and delay the advent of full facilities-based competition.

E. By Challenging Unbundled Switching, The ILECs Have Renewed Their Effort To Impose Wasteful Costs On New Entrants.

The ILECs' argument that they should not have to provide unbundled switching to any CLEC for any purpose is reminiscent of their "glue charge" argument. As the Supreme Court recounted, the ILECs persuaded the Eighth Circuit in 1997 that they had the right to disconnect loops from switches "'not for any productive reason, but just to impose wasteful reconnection costs on new entrants.'"[127] Before the Supreme Court reversed the Eighth Circuit's erroneous decision, the ILECs told CLECs that they would refrain from disconnecting loops from switches if the CLECs paid "glue charges."

In defending glue charges, ILECs made the same arguments they undoubtedly will advance in this proceeding. Specifically, they argued that, under the Commission's rules "a competitor can lease a complete, preassembled network at (allegedly very low) cost-based rates," thus allegedly "eviscerat[ing] the distinction between resale and unbundled access" and fostering "Government-sanctioned regulatory arbitrage."[128] After recounting the ILECs' arguments in that manner, the Supreme Court used harsh language in condemning the ILECs' contentions. It unanimously concluded that the Act "forbids the incumbents to sabotage network elements."[129] "It is well within the bounds of the reasonable for the Commission to opt in favor of ensuring against [such] an

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[127] *AT&T v. Iowa Utilities Board*, 525 U.S. at 395 (*quoting* Reply Brief for Federal Petitioners at 23).

[128] *Id.* at 393. For an economic analysis of the ILEC incentive to sabotage new entrants, *see* Beard, Ford and Spiwak, *Why AdCo? Why Now? An Economic Exploration into the Future of Industry Structure for the "Last Mile" in Local Telecommunications Markets*, Phoenix Center Public Policy Paper No. 12, available at www.phoenix-center.org (Federal Communications Bar Journal).

[129] *Id*. at 394.

anticompetitive practice," the Court further held.[130] It is unusual for the Court to describe litigants' actions as "anticompetitive practice[s]," much less as "sabotage," or to note that they were acting "'not for any productive reason, but just to impose wasteful reconnection costs on new entrants.'"

The ILECs nevertheless are again seeking to impose wasteful reconnection costs on competitors. They contend that they should be allowed to disconnect loops used by customers who have chosen to receive service from CLECs and require the CLECs to reconnect the loops – this time to their own switches. The Commission should ignore the fact that the CLECs' costs are considerably higher than the ILECs, they contend, because requiring CLECs to deploy switches will advance the goal of investment in facilities. While the ILECs would denounce the Commission as central planners from Pyongyang for implementing an industrial policy favoring UNE-L over UNE-P if it were not to their advantage,[131] they nevertheless propose that the Commission should force CLECs to use one mode of entry that imposes unnecessary costs and thereby handicaps competitors considerably. The ILECs do so, moreover, even though the Supreme Court has also already rejected their argument that the Act favors facilities-based entry over other modes.[132]

To the extent there are differences, the ILECs' current argument is more extreme than their prior argument. Previously, they merely sought to charge CLECs for reassembling loops and switches, or for refraining from disconnecting them in the first

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[130] *Id*. at 395.

[131] *See Iowa Utilities Board v. FCC*, No. 96-3321 (8th Cir.), transcript of Jan. 17, 1997, oral argument at 20-21 (attorney for ILECs contending FCC's competition rules would have support in Pyongyang and Havana).

place. Now they want to charge for disconnecting and reconnecting, and impose collocation costs and the cost of purchasing switches on CLECs as well. And they want to do so even though there is no benefit to consumers from this unnecessary duplication of facilities. Consumers instead would suffer since capital would be diverted from the development of innovative software to a purpose only slightly more useful than glue charges.

The ILECs also have a fall-back position that is similar to their glue charge position. Previously they stated that they would not actually sabotage network elements by disconnecting them for no good reason, but instead would refrain from doing so in return for the payment of glue charges set at "market rates" – by which the ILECs mean rates set by a dominant provider – rather than the rates established by Congress. Here the ILECs similarly contend that network elements will still be available, at least from the BOCs, on account of the section 271 checklist. But, again, they argue, those network elements ought not be available at the cost-rates required by Congress, but a "market rates" they establish. The difference between the rates mandated by Congress and the rates they seek to charge are equivalent to glue charges.

The ILECs and market analysts understand the effect that elimination of unbundled switching – or elimination of cost-based rates for unbundled switching – would have. In a recent analysis, J.P. Morgan concluded that elimination of switching from the list of elements that had to be unbundled "would create a significant barrier to entry in the local market and slow the roll-out of smaller carriers."[133] J.P Morgan

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[132] *AT&T v. Iowa Utilities Board*, 525 U.S. at 392.

[133] J.P. Morgan Securities Inc. – Equity Research, Telecom Services – Wireline, ""Bells: Margins, Consolidation & Regulation,"" March 21, 2002.

cautioned, however, that those changes would not help the BOCs substantially, because "if UNE-P were eliminated, the only real benefit would be the elimination of smaller competitors in the . . . residential market."[134] Z-Tel agrees that elimination of the UNE platform would create a significant barrier to entry into the residential market, but this is not a "benefit" from the perspective of anyone but the ILECs.

However, as we have shown, there is no basis for the ILECs' demand that switching be taken off the list of elements that must be provided to competitors seeking to provide voice service to the mass market. Indeed, the financial difficulties CLECs have encountered since 1999 make it even more clear that CLECs seeking to serve residential and small business customers are impaired without access to switching.

F. CLECs Would Be Impaired Without Access To The Other Unbundled Network Elements Of The UNE Platform.

Although these comments have focused thus far on explaining why Z-Tel's ability to provide the innovative services that it seeks to offer mass market customers would be impaired without access to unbundled local switching, switching is, of course, only one element of the UNE platform that Z-Tel uses provide the local component of its services. Although neither the Commission nor any party has seriously suggested that unbundled access to other critical elements used to provide voice services to mass market customers – such as loops, subloops, network interface devices, local transport, and signaling – could reasonably be curtailed at this time, it bears re-emphasis that Z-Tel depends on unbundled access to these facilities to deliver its innovative offerings to the mass market.

Before considering the additional elements of the UNE platform individually, however, it is important to recognize how this package of unbundled network elements as

[134] *Id*.

a whole fits into the services that Z-Tel provides. Specifically, Z-Tel offers residential and small business customers an innovative and competitively priced bundle of services including local calling, long distance service, and most importantly, a variety of vertical services such as advanced messaging that allow consumers to access their voice mail and address books through their Palm Pilots, e-mail, and over the Web. Much of the value of Z-Tel's services lies in these advanced features that the company provides through its own unique software and facilities. But to actually get these innovative services to the end user, Z-Tel still needs access to the UNE platform – including local loops, switching and transport – for which there is no equivalent available through wholesale markets. Accordingly, without access to these local facilities and services, Z-Tel's ability to provide the services it seeks to offer would certainly be impaired.

The listing of loops, transport, and switching in the section 271 checklist also provides powerful evidence that other ILECs should be required to provide unbundled access to those three elements, too. Congress singled out those three elements for special treatment because it thought access to those elements to be particularly important. In other words, it assumed that CLECs were likely to be impaired without access to those elements. The Commission accordingly noted, in the first paragraph of each relevant section of its first unbundling order, that loops, transport, and switching are included on the section 271 checklist.[135] As that shows, the Commission has recognized that inclusion of an element on the checklist supports the conclusion that all ILECs should be required to provide it on an unbundled basis under section 251(d)(2).

[135] 11 FCC Rcd ¶¶ 377 (loops), 410 (switching), 439 (transport).

Loops. It is undisputed that, apart from incumbent LECs, no widely available sources of such loops exist. Likewise, no one disputes that self-provisioning of local loops would be financially prohibitive and extremely protracted. Nor are any practical alternatives to loops – including mobile wireless networks, fixed wireless, or cable – available that can reach all or nearly all consumers currently served by incumbent LECs' loops with comparable quality of service or at similar costs.

The NPRM nonetheless seeks comment on a number of potential limitations on the availability of unbundled loops, including the possibility of distinguishing between existing facilities and new construction, or between new fiber optic loops and standard copper loops. Z-Tel believes that, at least in connection with the provision of services to mass market customers, the Commission should not embrace such distinctions. Indeed, such limitations would inevitably lead to undesirable and unjustifiable consequences. For example, if an ILEC were to roll out new loops for a new apartment building or subdivision, then under a new build/old build distinction, Z-Tel would be unable to deliver its services to customers at the new location – even though it could continue to serve customers in older developments next door. Similarly, under a new fiber/old copper distinction, new fiber loops presumably would not have to be unbundled even for narrowband voice signals – even though there would likely be no practical alternative means of delivering Z-Tel's innovative voice services to the new residents.

In short, the record in proceedings incorporated by the Commission into this docket convincingly demonstrates that loop is the quintessential bottleneck element, and that the problems of cost and delay for CLECs attempting to duplicate those facilities

would be insurmountable.[136] Since that evidence was presented, nothing has changed to suggest that those problems no longer exist. To the contrary, the most significant development the past couple of years is the dramatic tightening of the capital markets, and the resulting *increased* difficulties that CLECs face in attempting to expand the benefits of local competition to a broader base of mass market consumers.[137] Accordingly, the Commission should not now depart from the loop unbundling requirements that it has properly adopted in recent years.

Shared Transport. The Commission's *UNE Remand Order* found that "requesting carriers are impaired without access to unbundled dedicated and shared transport network" because "self-provisioning ubiquitous interoffice transmission facilities, or acquiring these facilities from non-incumbent LEC sources, materially increases a requesting carrier's costs of entering a market or of expanding the scope of its service."[138] That finding, while correct, is a dramatic understatement, at least in connection with providing services to mass market customers. Self-provisioning ubiquitous interoffice transmission, or obtaining such facilities from third parties, would not only "materially increase" Z-Tel's costs of providing service to those customers, but would likely be prohibitively expensive. Accordingly, Z-Tel would be impaired in its ability to provide the services it seeks to offer absent unbundled local transport.

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[136] *See, e.g., Comments of AT&T on Second Further Notice of Proposed Rulemaking*, CC Docket No. 96-98, at 59-66 (May 26, 1999) (explaining in detail the economic impossibility of duplicating the ILECs' local loops).

[137] *See supra,* Part II.B.4.

[138] 15 FCC Rcd. at 3842.

Significantly, the Commission has already recognized that access to shared transport is "particularly important" for mass market entry.[139] As the Commission found in the *Shared Transport Order*, incumbent LECs maintain "significant economies of scope, scale and density in providing transport facilities."[140] CLECs, and particularly those like Z-Tel serving mass market customers with low traffic volumes, lack these economies of scale, and would incur enormous costs in the absence of unbundled transport. Indeed, as the Commission itself acknowledged, dedicated transport is not a viable option for such CLECS – "dedicated transport is *not economically feasible* at low penetration rates," and therefore denying unbundled access to shared transport "would create a significant barrier to entry."[141] The Commission should not now depart from this well-reasoned conclusion.

The other elements of the UNE platform. To provide voice service to mass market customers, CLECs also need access to all the network elements comprising the platform. In the NPRM, the Commission emphasized that that "network element combinations including the loop, such as the UNE-Platform . . ., enable carriers to connect end user customers to the carriers' equipment."[142] The Commission also

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[139] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460, 12481 (1997) ("*Shared Transport Order*"), *aff'd by Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 597, 603-06 (8th Cir. 1998), *vacated and remanded by Ameritech Corp. v. FCC*, 526 U.S. 1142 (1999), *reinstated in part by Southwestern Bell Tel. Co. v. FCC*, 199 F.3d 996 (8th Cir. 1999).

[140] *Id.*

[141] *Id.* (emphasis added); *see also Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Cooperation and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd. 19985, 20079 (1997).

[142] *NPRM*, n.111.

suggested that CLECs "may view the incumbent's switch less as an independent network element than as a dependable method of obtaining access to the incumbent's loops."[143] Indeed, from Z-Tel's perspective the UNE platform is a dependable method of providing the local component of its service, which includes long-distance and advanced services as well. Z-Tel would be impaired if it could not use unbundled network elements to connect its end-user customers to its long-distance service and the equipment that provides Z-Tel's advanced features. Since the primary focus under section 251(d)(2) is on whether, without access to the element, a requesting CLEC would be impaired in providing the services it seeks to offer, the UNE platform must be available to CLECs providing voice service to mass market customers until a competitive substitute for these unbundled network elements is available on a wholesale basis.

That conclusion makes sense from a policy perspective as well, for a number of reasons. As discussed in more detail below, the availability of the UNE platform both speeds the introduction of competition into the mass market and – contrary to the claims of the ILECs – promotes the deployment of facilities. In addition, the availability of the UNE platform advances the goal of promoting innovation. A regulatory policy that required CLECs to devote their capital to the unnecessary duplication of the basic facilities needed to provide voice traffic would divert that capital from innovative purposes. Z-Tel has invested more than $100 million in developing innovative software, and it could not have done so had it been required to invest in redundant facilities.[144] For voice service provided to mass market customers, innovation is most likely to occur in

[143] *NPRM*., ¶ 59.

[144] *See* Attachment 3 (Curtis Decl.), ¶¶ 3, 9-10 .

the provision of advanced features above the UNE platform, rather than with respect to the provision of voice transmission without change in form or content.[145] Thus, making all of the elements comprising the platform available to CLECs like Z-Tel makes sense from a policy perspective as well as a legal perspective.

III. THE AVAILABILITY OF THE UNE PLATFORM PROMOTES THE RAPID INTRODUCTION OF COMPETITION AND FULL FACILITIES-BASED COMPETITION.

Under the framework established in the *UNE Remand Order*, the Commission considers various factors in addition to those relating to impairment as part of the unbundling analysis. The first two of those factors – and the two that have received the most attention from the Commission – are the "rapid introduction of competition in all markets" and the "promotion of facilities-based competition, investment, and innovation."[146] It is important to note that those two factors are not part of the impairment analysis itself and are not found in the text of the statute. Rather, speeding the introduction of competition and spurring the deployment of facilities are additional policy considerations added by the Commission, not by Congress.[147] The statutory basis for analysis of those additional considerations is that section 251(d)(2) directs the Commission to "consider, at a minimum," the extent to which CLECs would be impaired without access to a particular element.[148] Plainly, Congress authorized the Commission

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[145] *Id.*, ¶ 10.

[146] *UNE Remand Order*, 15 FCC Rcd. at 3747-49.

[147] *See id.* at 3746 ("[I]n addition to the ''necessary'' and ''impair'' standard, we conclude that we may consider . . . how the unbundling rules we adopt will promote facilities-based competition.").

[148] The Commission recognized in the NPRM that encouraging facilities investment is a non-statutory goal by addressing it under the heading "'At a Minimum' Statutory Analysis." *NPRM*, ¶¶ 21 *et seq*.

to consider other factors besides impairment and the Commission reasonably has chosen to do so.

With respect to the first factor, it is difficult to think of a better shorthand for the basic purpose of sections 251 *et seq*., which are sometimes referred to as the "market-opening provisions" of the 1996 Act, than the rapid introduction of competition to the local telephone markets. It is therefore only sensible to emphasize the effect of unbundling obligations on that factor. Conversely, it would be unreasonable for the Commission not to give significant weight to the goal of rapidly introducing competition to the local voice market. As discussed below, it is both clear and unsurprising that UNE-P advances the goal of making the local markets competitive.

Promoting the deployment of alternative facilities is also an important goal, which Z-Tel supports fully. However, the Commission should not *restrict* the availability of the UNE platform in order to spur the deployment of facilities. As discussed below, restricting the availability of unbundled network elements to further the goal of promoting facilities-based competition (a) is contrary to the terms of the statute and (b) will not increase the rate at which CLECs deploy facilities, as the relevant empirical evidence shows.

In the pertinent regulation, the Commission phrased the second additional factor it considers beyond impairment as whether unbundling an element "promotes facilities-based competition, investment, and innovation."[149] That phrasing suggests the Commission thinks facilities-based competition and investment always go hand-in-hand with innovation. That is not so. As noted above, Z-Tel has invested more than $100

[149] 47 C.F.R. sec. 51.317(b)(3)(ii).

million in software development.[150] That is where Z-Tel believes innovation in the mass market will occur, rather than by duplicating the functions of the loop, switch, and transport. If Z-Tel had invested in duplicative facilities, it would not have had the capital to invest in software development.[151] Broadband may raise different issues. But with respect to mass market voice service, imposing facilities-duplication requirements, particularly at a time when capital is scarce for CLECs, will impede innovation rather than advance it.

In the NPRM, the Commission asked whether it should revise the balance between the rapid introduction of competition and spurring the deployment of facilities to give more weight to the second. The Commission asked this question specifically with respect to broadband deployment, noting that "[s]ome parties have argued that imposing unbundling requirements on incumbent LECs, particularly with respect to innovative, new facilities, may deter investment by both incumbent LECs and others."[152] Z-Tel has not studied in detail the effect of unbundling on broadband facilities, but even a casual evaluation of the development of the broadband market reveals that it was a CLEC (Covad) that first offered DSL as a commercial service. This first commercial offering of broadband DSL services would not have been possible without access to unbundled loops, collocation, and transport.

As discussed in detail below, with respect to circuit switching used to provide voice service, the empirical evidence shows that requiring unbundling does not deter

[150] *See* Attachment 3 (Curtis Decl.), ¶ 3.

[151] *Id.*, ¶¶ 9-10.

[152] *NPRM*, ¶ 23.

investment in facilities. Rather, the availability of the UNE platform promotes the deployment of facilities.

A. The Supreme Court Rejected The ILECs' Argument That The UNE Platform Should Be Restricted To Spur The Deployment Of Facilities.

The Supreme Court considered the lawfulness of restricting the availability of the UNE platform in order to spur the deployment of facilities in *AT&T v. Iowa Utilities Board*. In that proceeding, the ILECs devoted more attention to their argument that a "facilities ownership requirement" should be inferred from the statute than to any argument other than the jurisdictional issue. The ILECs specifically argued to the Supreme Court that, in implementing the unbundling provisions of the Act, the Commission should have imposed a "facilities ownership" requirement on CLECs lest the Commission "deter investment in competing facilities and technology."[153] The ILECs added, just as they will no doubt contend in this proceeding, that CLECs should not be permitted to use "the platform" because "when the government forces a company to 'provide [a] facility and regulat[es] the price to competitive levels, then the [prospective entrant's] incentive to build an alternative facility is destroyed altogether."[154]

The Supreme Court squarely rejected those contentions. It held, in response to the argument that CLECs must be required to self-provision facilities in order to foster facilities-based competition, that "[t]he 1996 Act imposes no such limitation; if anything, it suggests the opposite by requiring in § 251(c)(3) that incumbents provide access to

[153] Reply Brief of Bell Atlantic, BellSouth, and SBC in Sup. Ct. No. 97-926, July 17, 1998, at 19.

[154] *Id*.

'any' requesting carrier."[155] Indeed, the Court found the ILECs' argument so lacking in merit that it devoted only a few sentences to rejecting the argument, and to rejecting it unanimously, although it was the ILECs' principal non-jurisdictional argument. So if there were empirical support for the ILECs' contention that restricting UNE-P would promote the deployment of facilities, adopting that position nevertheless would fly in the face of the Supreme Court's decision that the 1996 Act does not favor one mode of entry over another.

B. The Empirical Evidence Shows That The Availability The UNE Platform Spurs The Deployment Of Facilities.

Contrary to the assertions of the ILECs, the availability of UNE-P *promotes* the rapid introduction of competition and the deployment of facilities. Four empirical analyses appended to these comments support that conclusion. Since 1999, the Commission's rules have made UNE-P available, except in the top 50 MSAs to serve customers with more than three lines, where the Commission rules deny access to one critical component of the UNE platform, unbundled local switching. The fact that the Commission by rule has not required UNE-P to be available ubiquitously nationwide permits econometric analysis to explore fully whether the restriction on unbundled local switching has harmed or helped the development of "facilities-based" competition.[156]

These econometric analyses fully rebut ILEC arguments that unbundled local switching somehow causes harm to competition and the industry. Under the ILECs' view (a) competitive entry should not be hampered by the three-line rule since, they contend,

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[155] *AT&T v. Iowa Utilities Board*, 525 U.S. at 392.

[156] As discussed below, the fact that a few states, like New York and Texas, have ordered wider implementation of the UNE platform beyond the Commission's minimum requirements, is taken into account in these econometric analyses.

CLECs are not be impaired without access to the UNE platform, and (b) CLECs should deploy switches in the areas where they do not have full access to UNE-P to a greater extent than where UNE-P is fully available. The evidence shows the opposite on both counts. The attached chart entitled "*Without UNE-P, What's Left?*" compares the percentages of customers served by CLECs using UNE-P, UNE-L, and resale in New York, Texas, Georgia, and the rest of BellSouth territory.[157] As an initial matter, it is plain that the availability of UNE-P in New York and Texas is responsible for the much higher rates of competitive entry in those states, and that those states without UNE-P have experienced relatively little competitive entry.

For example, the chart shows that CLECs have a 19.7% market share in New York and a 7.3% market share in Georgia, with the difference being almost entirely attributable to the use of UNE-P: CLECs use UNE-P to serve 14.5% of the New York market but only 3.1% of the Georgia market. So the chart shows that UNE-P promotes the rapid introduction of competition, the first of the considerations enumerated by the Commission in the *UNE Remand Order*. Contrary to the ILECs' position, if CLECs were not impaired without access to switching they would have a market share outside New York and Texas comparable to their market share in those two states.

The analysis in the white paper set forth as Attachment 8 confirms the conclusion that the availability of UNE-P promotes the rapid introduction of competition.[158] Using the FCC's reports on the percentage of lines served by CLECs in different states, Z-Tel examined the effect of a number of variables on the rate of competitive entry. Not

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[157] *See* Attachment 7 (chart entitled "*Without UNE-P, What's Left?*") ("UNE-P Chart").

[158] Z-Tel Policy Paper No. 3, *An Empirical Exploration of the Unbundled Local Switching Restriction* (March 2002) (Attachment 8).

surprisingly, the CLEC market share is higher in larger, more densely populated markets with relatively high median incomes. But even with those variables under consideration, whether entry by means of UNE-P was restricted had the most significant effect on the rate of competitive entry: there is considerably more competition where UNE-P is available on an unrestricted basis than where it is restricted. On average, removing the restriction would increase the rate of competitive entry by about 50%. That would mean that many more consumers would have additional options that they find superior to ILEC service, absent the Commission's restriction on UNE-P availability.

Attachment 8 also confirms the impairment analysis above regarding the limitations and difficulties with self-provisioned switching. When the Commission promulgated the three-line rule in the *UNE Remand Order*, it did so on the basis that CLECs would be able to self-provision switching in the Top 50 MSAs to customers with more than three lines. If the Commission's theory that self-provisioned switching is an adequate alternative were correct, *there should have been no adverse impact on the level of competition in states where the restriction applies.* That is clearly not the case. Instead of opting to self-provision switching to serve mass market customers in restricted areas, it appears that CLECs are simply not providing as much mass market service in restricted states.

These analyses, of course, examine the impact of the restrictions that have been in effect. Although, as discussed above and as the evidence shows, the three-line restriction has seriously impaired CLECs' ability to serve the mass market, it is important to recall that the ILECs now contend that the availability of UNE-P should be restricted still further. The Commission's acceptance of that contention would not "merely" reduce the

extent of competitive entry in restricted states by 50%. That figure represents only the effect of the current three-line rule. Restricting UNE-P further would have a greater effect – most likely a much greater effect.

In addition, contrary to the claims of the ILECs, restricting the availability of UNE-P does not lead to increased facilities deployment. Indeed, the evidence shows that where UNE-P is available without restriction there is *more* investment in facilities by CLECs. As noted above, the number of customers served by UNE-P in New York, where UNE-P has been available without restriction, greatly exceeds the number served in Georgia.[159] But contrary to the ILECs' contentions, that has not resulted in more competition using UNE-L in Georgia. Specifically, 2.2% of customers in New York are served by CLECs that deploy their own switch, but only 1.5% in Georgia. Thus, UNE-L is used more commonly in New York than in Georgia, which is opposite to the effect predicted by the ILECs.[160]

Another Z-Tel econometric analysis, included as Attachment 9,[161] confirms that the ILECs' preferred approach both leads to less competitive entry and reduces facilities deployment by CLECs. This analysis examines the relationship between CLEC switch deployment in areas where unbundled local switching is restricted and where it is

[159] *See* Attachment 7 (UNE-P Chart).

[160] It is important to note that these levels of UNE-Loop penetration are still relatively low, while the volume of UNE-P entry in New York is what largely sets the perception of that that state as "more competitive" than other states.

[161] Z-Tel Policy Paper No. 4, *Does Unbundling* Really *Discourage Facilities-Based* Entry: *An Econometric Examination of the Unbundled Switching Restriction* (February 2002) (Attachment 9).

unrestricted.[162] If the ILEC theory were correct, states where unbundled local switching is available on an unrestricted basis should see *less* switch deployment by CLECs compared to other states, all other relevant factors remaining equal.

The evidence in Attachment 9 shows the opposite. CLECs are, in fact, all other factors equal, *more* likely to deploy their own switches in areas where unbundled local switching is available on an unrestricted basis. Indeed, making the UNE platform available without restriction would *increase* switch deployment by 19%. The results of this study confirm the congressional rationale behind requiring unbundling – where the UNE platform is available, entrants can sign up customers, build market share, and obtain revenue flow *before* making significant capital expenditures. By lowering all barriers to entry, subsequent capital investment by CLECs is much more likely to occur. Again, it bears emphasis that this study measures the effect of the three-line rule. Further restricting the availability of UNE-P would most likely lead to a more substantial decrease in rate of switch deployment by CLECs.

Finally, a fourth empirical analysis, included as Attachment 10,[163] examines the relationship between the availability of unbundled local switching, the prices for unbundled network elements, and CLEC switch deployment. ILECs frequently argue that the availability of unbundled elements at cost-based prices provides a disincentive for CLECs to invest in their own facilities. Again, contrary to the assertions of the ILECs, lower prices for loops and unbundled switching promote, rather than deter, switch

[162] The dependent variable in this analysis was the number of switches deployed by CLECs after the three-line restriction took effect.

[163] T. Randolph Beard, George S. Ford, and Thomas W. Koutsky, *Facilities-Based Entry in Local Telecommunications: An Empirical Investigation* (March 2002) (draft) (Attachment 10).

deployment by CLECs. Once again, this empirical evidence exposes the ILEC anti-competition argument, which usually appears as a thinly veiled call for "real" competition.

The finding that the availability of the UNE platform promotes facilities deployment is not surprising. Competitors seeking to serve the mass market need a mode of entry that permits them to serve a large number of customers and have every reason to reduce their reliance on the ILEC network wherever possible. Once they have established a customer base, CLECs will attempt to find other platforms, especially if ILECs are required to eliminate the hot cut bottleneck. Restricting the availability of the mode of entry that best promotes the rapid introduction of competitive service to mass market customers – UNE-P – does not make it more likely that a rational competitor will instead choose a mode of entry that will not work. Many of those that have nevertheless tried are now in bankruptcy proceedings. But where facilities deployment makes sense, CLECs will invest in them, although facilities deployment makes the most sense after a competitor has developed a customer base.[164]

If the Commission accepts the ILEC arguments against unbundled local switching and the UNE platform, the Commission will significantly delay the introduction of full facilities-based competition. A CLEC that deploys a switch thereby ties itself to the ILEC's network because, in order to provide service by means of UNE-L, a CLEC must collocate in ILEC central offices and design its transport to work from those points. The substantial investments required by UNE-L would have to be abandoned in order to transition to another platform, such as one provided by a cable operator or a wholesaler of

exchange service and exchange access. Thus, even if restricting the availability of unbundled switching led to increased deployment of switches by CLECs, that would delay the attainment of *full* facilities-based competition. In addition, the UNE-L CLEC's continuing reliance on the ILEC's loop would require a greater degree of involvement by regulators than would competition between carriers using entirely different platforms. So the goal of decreasing the extent of regulation simply is not furthered by a policy that favors UNE-L over UNE-P.

As several progressive states have concluded,[165] making the UNE platform available to serve mass market customers advances the goals of the 1996 Act. It will speed the introduction of competition to that market.[166] It also will stimulate facilities

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[164] *See generally* Z-Tel Policy Paper No. 11, *Putting the Horse Before the Cart*: *The History and Future of the UNE Platform* (February 2001) (Attachment 11).

[165] *See, e.g.,* New York Staff Testimony, *supra*, note 74, at 31-32 (explaining that Verizon – New York "has not enforced the tariff restrictions" implementing the three-line rule and has agreed to make the platform "available throughout Verizon's territory to service small business customers, small being defined as under 18 lines"). In Texas, SBC agreed, as part of the Texas 271 Agreement, to provide unbundled switching without limitation. *See* Southwestern Bell Telephone Company's Post-Hearing Brief, Docket No. 24542 (Feb. 15, 2002), at 3, 5, & n.8. In addition, the Illinois legislature recently made UNE-P available by statute. *See* 220 ILCS 5/13-801(d)(3) (2001) ("Upon request, an incumbent local exchange carrier shall combine any sequence of unbundled network elements that it ordinarily combines for itself . . .").

[166] Indeed, a recent decision by the Indiana Utility Regulatory Commission not only confirmed the availability of UNE-P, but found that the non-recurring charges for UNE-P should be lowered to spur competition. The Commission wrote:

> Six years after the passage of the Telecommunications Act of 1996, the advent of local competition – *particularly in the residential market* – still has not arrived. . . . It has become evident that more must be done to open Indiana's market to competition.

Commission Investigation and Generic Proceeding on Ameritech Indiana's Rates for Interconnection, Service, Unbundled Elements, and Transport and Termination under the Telecommunications Act of 1996 and Related Indiana Statutes, Order, Cause No. 40611-S1 (Phase 1) (rel. March 28, 2002).

deployment. The ILECs' position, in contrast, will achieve the worst of all worlds (from a public policy perspective rather than the ILECs' perspective): it will slow (or reverse) competitive entry into the mass market; it will delay the deployment of facilities by CLECs; and it will tie CLECs to the ILEC network, thus impeding the development of full facilities-based competition.

C. The Section 271 Applications That Have Been Granted Would Have To Be Reconsidered If The UNE Platform Were Restricted In Order To Promote The Deployment Of Facilities.

Any significant change in the availability of the UNE platform to provide service to mass market customers – and particularly a change based on the goal of spurring the deployment of alternative facilities – would call into question the section 271 applications that have already been granted. "Track A" of section 271 requires that the applicant demonstrate the existence of a "facilities-based competitor" offering "telephone exchange service either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."[167] The FCC first considered the meaning of "own telephone exchange service facilities"— and specifically whether this phrase encompasses unbundled network elements obtained from a BOC — in the order denying Ameritech's application to provide long-distance service in Michigan.[168]

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[167] 47 U.S.C. § 271(c)(1)(A).

[168] *See* Memorandum Opinion & Order, *In re Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, 20590 (1997) (hereinafter "*Michigan 271 Order"*).

The Commission conducted a lengthy analysis of the parties' arguments, the text of 271(c)(1)(A), and the legislative history before concluding that "own telephone exchange service facilities" includes not only those facilities to which a CLEC has legal title, but also UNEs that a CLEC obtains from a BOC.[169] The Commission noted that this decision "will further Congress' objective of opening the local exchange and exchange access markets to competition [because] Congress sought to ensure that new entrants would be able to take advantage of any, or all three, of the entry strategies which the Act established."[170] The Commission also has interpreted "facilities-based" competition to include leasing of unbundled network elements for universal-service purposes.[171]

In reviewing BOC applications to provide inter LATA service, the Commission has continued to rely upon its conclusion that UNE-P competitors are "facilities-based" within the meaning of section 271(c)(1)(A). Indeed, when the Commission granted SBC's Kansas application, it "conclude[d], as the Kansas Commission did, that SWBT demonstrates that it satisfies the requirements of Track A based on the interconnection agreements it has implemented with competing carriers in Kansas. . . . Specifically, the record demonstrates that both Ionex Communications and Birch Telecom provide service

[169] *Id.* at 20598.

[170] *Id.* (citations omitted); *see also id.* at 20598 n.231 ("[M]any of the benefits that consumers would realize if competing providers build facilities can also be realized through the use of unbundled network elements.").

[171] *See Federal State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8862 (1997) (concluding that "a carrier that offers any of the services designated for universal service support, either in whole or in part, over facilities that are obtained as unbundled network elements pursuant to section 251(c)(3) … satisfies the [own] facilities requirement of section 214 (e)(1)(A)"); *id.* at 8866.

to residential subscribers exclusively over their own facilities using the UNE platform."[172]

It is not clear how many other section 271 applications were premised on the presence of a UNE-P competitor. But because the BOCs have been entitled to rely on such competitors in making their Track A showings, and the issue has not been revisited since the *Michigan 271 Order*, it is likely that many applicants relied on a UNE-P competitor to make their Track A showing. Eliminating the availability of the UNE platform would therefore call into question the continuing validity of all of the section 271 applications that have been granted.

The Commission must revisit section 271 authorizations if the "Bell operating company has ceased to meet any of the conditions required for such approval."[173] Demonstrating the existence of a facilities-based competitor is, of course, such a condition, and it is difficult to see how section 271 authorizations could remain in force if the Commission pulled the plug on the very "facilities-based" competition that justified the grant. Moreover, if the availability of unbundled network elements were restricted in a misguided effort to spur the deployment of facilities, it would be particularly difficult to justify keeping in effect section 271 grants premised on a facilities-based competitor that leased the UNE platform. The Commission should avoid this morass by continuing to make the UNE platform available to serve mass market customers.

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[172] *Joint Application by SBC Communications Inc., Southwestern Bell Tele. Co., & Southwestern Bell Communications Servs., Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas & Oklahoma*, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6256-57 (2001).

[173] *See* 47 C.F.R. § 271(d)(6).

IV. SECTION 251(d)(3) AUTHORIZES STATE COMMISSIONS TO ESTABLISH ADDITIONAL UNBUNDLING OBLIGATIONS.

The Commission sought comment "on the extent to which state commissions can act in creating, removing, and implementing unbundling requirements, and the statutory provisions that would provide authority for states to act, consistent with applicable limitations on delegations of authority to the states."[174] As the Commission recognized, Congress addressed these issues in section 251(d)(3). As discussed below, that provision does not authorize states to *remove* elements from the national list. However, it authorizes state commissions to *create* unbundling requirements and restricts the Commission's ability to preempt such additions. In particular, the Commission may not bar the states from adding elements merely because the Commission has restricted access to them on the theory that such restrictions will promote the deployment of facilities. Moreover, in *implementing* the unbundling provisions, the Commission would be wise to give considerable weight to the views of the states with respect to national unbundling obligations.

As the Commission concluded in 1999, it is clear that states generally may *create* additional unbundling obligations.[175] Section 251(d)(3), entitled "preservation of state access regulations," provides that the FCC "shall not preclude the enforcement of any regulation, order, or policy of a State commission that . . . establishes access and interconnection obligations of local exchange carriers." A state decision creating unbundling requirements is preserved by section 251(d)(3). By its terms, that provision preserves the states' right to "establish[] access and interconnection obligations of local

[174] *NPRM*, ¶ 75.

[175] *See UNE Remand Order*, 15 FCC Rcd. at 3767-68.

exchange carriers" and a rule creating unbundling requirements "establishes access . . . obligations."

State commissions typically have plenary authority pursuant to state law to enact rules governing local exchange carriers, and state commissions therefore need not act pursuant to authority delegated to them by the FCC when imposing additional unbundling obligations. Texas law, for example, authorizes its PUC to order unbundling after considering "the public interest and competitive merits of further unbundling."[176] Accordingly, no difficult delegation questions are likely to be presented with respect to the addition of elements.

The congressional preservation of state authority to add elements is subject to two limitations: the state unbundling obligation must be "consistent with the requirements of this section" and may "not substantially prevent implementation of the requirements of this section and the purposes of this part." Notably, however, section 251(d)(3) does *not* authorize the Commission to preempt state unbundling obligations merely because they differ from those established by the FCC.

The Commission nevertheless concluded in 1996 that state unbundling rules that were inconsistent with the Commission's unbundling rules were preempted.[177] The Eighth Circuit reversed: "The FCC's blanket statement that state rules must be consistent with the Commission's regulations promulgated pursuant to section 251 is not supportable in light of subsection 251(d)(3)."[178] Rather, the court held, that provision

[176] Texas Public Utility Regulatory Act, Chapter 60, Subchapter B, § 60.021.

[177] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 15551-52 (1996).

[178] *Iowa Utilities Board v. FCC*, 120 F.3d at 807.

was meant "to shield state access and interconnection orders from FCC preemption."[179] In reaching that conclusion, the Eighth Circuit contrasted section 251(d)(3) with sections 252(c)(1) and 261(c), which require other state rules to conform to FCC regulations. The court accordingly struck down the FCC's conclusion "that merely an inconsistency between a state rule and a Commission regulation under section 251 is sufficient for the FCC to preempt the state rule."[180] The Commission did not challenge that holding in the Supreme Court.

In light of the Eighth Circuit's controlling decision, the Commission should not attempt, in advance, to limit the state commissions' authority to create unbundling requirements. In the interpretation of section 251(d)(3) that was struck down by that court, the Commission had "assert[ed] that a state policy that is inconsistent with an FCC regulation is necessarily also inconsistent with the terms of section 251 and substantially prevents the implementation of section 251."[181] The Eighth Circuit rejected that assertion: "The FCC's conflation of the requirements of section 251 with its own regulations is unwarranted and illogical. It is entirely possible for a state interconnection or access regulation, order, or policy to vary from a specific FCC regulation and to be consistent with the overarching terms of section 251 and not substantially prevent the implementation of section 251."[182] Therefore, any request by an ILEC to have the Commission preempt an additional state unbundling requirement should be conducted as

[179] *Id*.

[180] *Id.*

[181] *Id.* at 806.

[182] *Id*.

a separate adjudicative proceeding, similar to that conducted under section 253 when a state regulation is alleged to constitute a barrier to entry.

Even after such a proceeding, the Commission would have no authority to preempt a state rule requiring an element to be unbundled merely because the Commission had determined that facilities-based competition would be promoted if the element were not made available on an unbundled basis nationwide.[183] Promoting facilities-based competition is not a term of the Act, as explained above. Accordingly, section 251(d)(3)'s express limitation on the FCC's authority to preempt controls. A disagreement between the FCC and a state commission concerning the extent to which elements should be made available in order to promote the non-statutory goal of promoting facilities-based competition would not rise to the sort of disagreement for which the Commission is authorized to preempt.

In the *UNE Remand Order* – and the regulation concerning state authority adopted in that proceeding – the Commission recognized this limitation on its authority. The regulation directs that state commissions need only "comply with the standards of this § 51.317 when considering whether to require the unbundling of additional network elements." That language clearly indicates that the Commission recognized that state commissions may add unbundling requirements. Similarly, section 51.317(d) authorizes the states to consider all of the standards of the section, which include "whether unbundling of a network element promotes the rapid introduction of competition." Accordingly, the Commission has acknowledged – correctly – that state commissions

[183] As stated above, any decision to spur the deployment of facilities by limiting the availability of the platform to serve mass market customers would be misguided.

must be given considerable leeway under section 251(d)(3) to determine whether to order additional unbundling in their states.[184]

In *implementing* national unbundling requirements, the Commission should, of course, give great weight to the advice the state commissions provide in their comments concerning which elements should be unbundled on a nationwide basis. NARUC has already made its position clear: it favors "the universal availability of the UNE-P."[185] Given the Commission's intent to conduct a more granular analysis and the state commissions' greater familiarity with the local marketplace, the Commission would be well advised to provide a formal mechanism for obtaining the views of the state commissions, as requested by NARUC.[186] But the task of setting forth a list of elements that must be unbundled on a nationwide basis is committed to the FCC by section 251(d)(2). A key manner in which state commissions in effect will fine tune the Commission's decisions, and hence implement Congress's overriding goal of opening the local telecommunications markets to competition, will be by establishing additional unbundling requirements.

If the Commission removes any elements from the national list, it should make removal effective in any state upon the concurrence of the state commission, as the

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[184] Indeed, the regulation exceeds the Commission's authority by attempting to constrain state discretion to consideration of those factors the Commission has deemed relevant. Section 251(d)(3) permits states to consider any factors they deem relevant, subject to the requirements that the state determination be "consistent with the requirements of this section" and "not substantially prevent implementation of the requirements of this section and the purposes of this part." Nothing in those provisions limits the range of state consideration to the factors listed by the Commission.

[185] The NARUC *UNE-P Resolution* is appended as Attachment 1.

[186] Letter from Joan Smith, *et al*., Chair of NARUC's Communications Committee, to Michael Powell, FCC Chair, CC Docket 96-98 (Dec. 5, 2001).

PACE coalition has proposed.[187] Respect for the important role of the state commissions demands no less.[188]

The Commission correctly concluded in 1999 that state commissions may not *remove* elements from the FCC's list of UNEs that must be made available to competitors. Section 251(d)(3) preserves any state commission rule that "establishes access and interconnection obligations." A decision that an element need not be unbundled does not "establish" an "obligation," and therefore is not preserved by section 251(d)(3).[189]

In sum, as Vermont stated in 1999, the Commission's task is to "establish a *floor* beneath which State regulatory bodies may not go, but not a *ceiling* on State efforts to encourage competition."[190] That is what the Commission concluded in 1999, and that conclusion was not even challenged, despite the ILECs' penchant for litigation. The Commission should adhere to its conclusion that state commissions may add to, but may

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[187] *See* Promoting Active Competition Everywhere ("PACE") Coalition Petition, CC Docket Nos. 01-339, 96-98, 98-147 (Feb. 6, 2002).

[188] Should the Commission substantially change the national unbundling obligations by eliminating an element from the national list and not require the concurrence of the state commission, it should at least provide sufficient time for the state commissions to consider whether local conditions warrant the continued availability of that element and, if so, to add the element to its own list. In the *UNE Remand Order*, 15 FCC Rcd. at 3926, the Commission generally made changes effective 30 days after publication in the Federal Register, but made more substantial changes effective 120 days after publication. For a change of the magnitude of removing an element from the list, the states should be given a year to decide. That is approximately how long the Commission believes it will need to complete this rulemaking, and it is not clear why the state commissions should be expected to act more quickly in determining whether elements should be available.

[189] But as the Commission concluded in 1999, the statute does not prevent a state from removing an element that it required to be unbundled. *UNE Remand Order*, 15 FCC Rcd. at 3768.

[190] Vermont PSB comments, CC Docket 96-98 (May 26, 1999), at 4-5 (emphasis in original).

not subtract from, the list of elements that ILECs must make available on an unbundled basis. That is the position recently adopted by NARUC as well. In February, "urge[d] the FCC to recognize that States may continue to require additional unbundling to that required by the FCC's national minimum."[191]

CONCLUSION

Preserving the availability of the UNE platform will maintain the competition that has developed in the residential market. If the three-line rule is raised, that will permit the development of competition to serve the small business market. The availability of the UNE platform also will *advance* the development of full facilities-based competition. In contrast, adoption of the ILECs' proposals would slow the introduction of competition to the mass market, or even reverse the competition that has developed. The ILECs' proposal also would tie CLECs to the ILECs' facilities, thus impeding the development of full facilities-based competition.

With respect to specific legal issues raised in the NPRM, the Commission should adhere to its application of section 251(d)(3). That provision preserves the ability of state commissions to add to the list of elements ILECs must provide on an unbundled basis and prevents the Commission from barring states from establishing additional unbundling obligations on the ground that they differ from those established by the Commission. Section 251(d)(3) also bars the Commission from preempting state unbundling rules on the ground that the state commission reached a different conclusion than the Commission on the effect of an unbundling obligation on the goal of promoting facilities-based competition.

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[191] *See* NARUC *Resolution Concerning the States' Ability to Add to the National*

The Commission should reexamine its interpretation of the section 271 checklist. The Commission properly concluded that BOCs must provide the network elements listed on the checklist, including loops, transport, and switching. Contrary to the Commission's prior conclusion, however, the checklist also requires BOCs to provide those elements at cost-based rates in accordance with the statutory rules governing interconnection agreements. In addition, the inclusion of elements on the checklist provides strong evidence that all ILECs must unbundle the key elements of the platform on a nondiscriminatory basis at cost-based rates.

The National Association of State Regulatory Commissioners (NARUC) recently concluded that "[m]any State commissions have embraced UNE-P as a means to expand customer choice for mass market, residential, and small business consumers." After noting the "decrease in the willingness of capital markets and manufacturers to finance the deployment of new and rival equipment," NARUC resolved that "State commissions should support the implementation of universal availability of the UNE-P." By pointing to the change in the capital markets, NARUC identified the most significant change that has occurred since the *UNE Remand Order* was issued. This Commission should also take that change into account and conclude that the elements necessary to provide the UNE platform should continue to be on the list that is available nationwide to provide voice service to mass market customers. Any other conclusion threatens to reverse the progress that has been made to fulfill the promise of the 1996 Act and provide choice to those customers for the first time.

Minimum List of Network Elements (Attachment 11).

This Commission recently – and correctly – told the Supreme Court that "the UNE platform has been the most important vehicle for competitive entry into local markets for residential and small business customers."[192] The Commission should not retreat from that position. Rather, as we have shown, it is clear that competitors will be impaired and consumers will suffer absent the continued availability of the UNE platform.

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April 5, 2002

[192] Brief for Petitioners Federal Communications Commission and the United States, No. 00-511 *et al.*, *Verizon Communications, Inc. v. FCC* and related cases 44 (April 2001).